TWENTY-SECOND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C., APRIL 26–28, 1928

PROGRAM

Thursday, April 26, 1928, 8.30 o'clock p. m.

The Outlook for Pan-Americanism—Some Observations on the Sixth International Conference of American States. HONORABLE CHARLES EVANS HUGHES, *President of the Society.*

The Status of Canada from an International Point of View. B. RUSSELL, formerly *Justice of the Supreme Court of Nova Scotia.*

Report from the Special Committee for the Progressive Codification of International Law. PROFESSOR JESSE S. REEVES, *Chairman.*

Election of Committee on Nominations.

Friday, April 27, 1928, 10 o'clock a. m.

Nationality. CLEMENT L. BOUVÉ, *American Agent, General Claims Commission—United States and Mexico.*

General Discussion.

Friday, April 27, 1928, 2.30 o'clock p. m.

Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners. CHARLES E. HILL, *Professor of Political Science, George Washington University.*

General Discussion.

Friday, April 27, 1928, 4.30 o'clock p. m.

Meeting of the Executive Council at No. 2 Jackson Place, Northwest.

Friday, April 27, 1928, 8.30 o'clock p. m.

Territorial Waters. GEORGE GRAFTON WILSON, *Professor of International Law, Harvard University.*

General Discussion.

Saturday, April 28, 1928, 10 o'clock a. m.

Conclusion of discussions of preceding papers.

Business meeting and adjournment.

Meeting of the Executive Council.

Saturday, April 28, 1928, 7.30 o'clock p. m.

Annual dinner at the Willard Hotel.

Toastmaster: The HONORABLE CHARLES EVANS HUGHES, *President of the Society.*

Speakers:

His Excellency MR. PAUL CLAUDEL, *French Ambassador.*

HONORABLE EDITH NOURSE ROGERS, *Representative in Congress from Massachusetts.*

DR. JAMES BROWN SCOTT, *Director of the Division of International Law, Carnegie Endowment for International Peace.*

CONTENTS

CONTENTS

The AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries outside the domestic postal zone pay one dollar extra per annum for foreign postage; Canada fifty cents extra.)

The annual subscription to non-members of the Society is five dollars per annum (plus the above mentioned sums for foreign postage) and should be placed with the American Society of International Law, 2 Jackson Place, Washington, D. C.

Single copies of the JOURNAL will be supplied by the Society at $1.50 per copy.

Applications for membership in the Society, correspondence with reference to the JOURNAL, and books for review should be sent to GEORGE A. FINCH, Recording Secretary and Managing Editor, 2 Jackson Place, Washington, D. C.

THE WAR PREVENTION POLICY OF THE UNITED STATES[1]

By Honorable Frank B. Kellogg
Secretary of State of the United States

It has been my privilege during the past few months to conduct on behalf of the Government of the United States negotiations having for their object the promotion of the great ideal of world peace. Popular and governmental interest in the realization of this ideal has never been greater than at the present time. Ever since the World War, which spelled death to so many millions of men, spread desolation over so much of the Continent of Europe and shocked and imperiled neutral as well as belligerent nations, the minds of statesmen and of their peoples have been more and more concerned with plans for preventing the recurrence of such a calamity. Not only has the League of Nations been preoccupied with studies of security and world peace, but members of the League of Nations have concluded additional special treaties like those signed at Locarno in 1925, and recently at Habana the United States and 20 other American States, including 17 members of the League of Nations, expressed by formal declaration their unqualified condemnation of war as an instrument of national policy, and agreed to call a conference to draft appropriate treaties of compulsory arbitration.

The Government of the United States will never be a laggard in any effective movement for the advancement of world peace, and the negotiations which I have recently been carrying on have grown out of this government's earnest desire to promote that ideal. They have had a dual character, having been concerned in part with the framing of new arbitration treaties to replace the so-called Root treaties, several of which expire by limitation this year, and in part with the anti-war treaty which M. Briand proposed to me last summer. I welcome the opportunity which you have afforded me to express before this audience my views on these questions and to explain the objects and aims of the Government of the United States with respect thereto.

In the first place it should be clearly understood that the treaty of arbitration which was signed last month with France has no relation whatsoever to the proposal submitted by M. Briand for a treaty declaring against war and renouncing it as an instrument of national policy. It is true that the preamble to the arbitration treaty recites that France and the United States are "eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever

[1] An address delivered before the Council on Foreign Relations at New York City, March 15, 1928. Printed from text supplied by the author.

the possibility of war among any of the Powers of the world," but a preamble is not a binding part of a treaty. If war is to be abolished it must be through the conclusion of a specific treaty solemnly binding the parties not to resort to war with one another. It cannot be abolished by a mere declaration in the preamble of a treaty. Even though without legal effect, however, a formal expression of the peaceful aspirations of the governments and their common desire to perfect a mechanism for the pacific settlement of justiciable disputes such as that found in the preamble of the arbitration treaty, is, I believe, very helpful since it publicly defines the positions of the two governments in a matter the importance of which is hard to exaggerate.

The arbitration treaty itself I regard as a distinct advance over any of its predecessors, and I hope it can serve as a model for use in negotiations with other governments with which we have no present arbitration treaty or where the existing Root treaties shortly expire. I have already instituted negotiations with the British, German, Italian, Japanese, Norwegian, and Spanish Governments on the basis of the draft treaty which I submitted to France last December, and I have indicated to all inquiring governments that I shall be pleased to conclude with them new treaties similar to that recently signed with France.[2] If a comprehensive series of such bilateral treaties can be put into effect between the United States and the other nations of the world, I feel that a very effective mechanism for the pacific settlement of justiciable disputes will have been established. I attach such importance to the treaty just concluded with France that I shall discuss its provisions briefly before proceeding to a discussion of the correspondence which has been exchanged with France on the subject of the so-called Briand proposal.

Article 1 of the new arbitration treaty contains the language of the first paragraph of the first article of the Bryan treaty of 1914 providing for investigation and report by a permanent international commission of all disputes not settled by diplomacy or submitted to arbitration. My purpose in including this reference to the Bryan treaty was to recognize anew the efficacy of the procedure established under the Bryan treaties and to unite by reference in one document the related processes of conciliation and arbitration. The force and effect of the Bryan treaty with France has in no sense been impaired by the new treaty, nor was it intended that it should be. This is the understanding of both governments and notes to that effect have been exchanged.[3] So far as the legal effect of the new treaty is concerned, Article 1

[2] Up to April 9 negotiations for arbitration treaties similar to the treaty with France had been initiated with the governments of the following additional countries: Portugal, Denmark, Austria, Hungary, Belgium, Czechoslovakia, Poland, The Netherlands, Switzerland, Lithuania, Latvia, and Finland. (State Department press notice, April 9, 1928.)

[3] Up to April 9 negotiations for concilation treaties similar to the Bryan treaties had been initiated by the government of the United States with tne governments of the following countries: Japan, Germany, Austria, Hungary, Belgium, Czechoslovakia, Poland, Lithuania, Latvia and Finland. (State Department press notice, April 9, 1928.)

could be left out entirely and mention of the Bryan treaty made only in Article 2 where there is reference to the conciliation procedure under that treaty.

Article 2 provides that—

> All differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above-mentioned Permanent International Commission, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the convention of October 18, 1907, or to some other competent tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference.

It also contains a clause providing that the special agreement must in each case be ratified with the advice and consent of the Senate. This is the usual practice in the United States and I do not know of a single case where the Senate has refused to consent to any special agreement of arbitration.

Article 3 excludes from arbitration under the treaty disputes the subject matter of which is within the domestic jurisdiction of either of the parties, involves the interests of third parties, depends upon or involves the maintenance of the Monroe Doctrine, and depends upon or involves the observance of the obligations of France under the Covenant of the League of Nations. It is difficult for me to see by what claim of right any government could properly request arbitration of disputes covered by these exceptions since few, if any, would present questions justiciable in their nature. As a practical matter, therefore, I do not feel that the general applicability of the new treaty is materially restricted by the four clauses of exclusion. The Root treaty which it supersedes contained a clause excluding from its scope questions affecting "the vital interests, the independence or the honor" of the contracting states. This clause was borrowed from an Anglo-French arbitration treaty of 1903 and represented the reservations generally regarded as necessary 25 years ago. Arbitration has repeatedly proved its worth since then, and inasmuch as such vague and all-inclusive exceptions can be construed to cover almost any substantial international dispute and might well operate to defeat the very purpose of an arbitration treaty, I decided to eliminate them and to specify with particularity the questions excluded from arbitration. In this respect the new treaty is a much more satisfactory and practical instrument for the adjustment of justiciable international controversies, and it is only justiciable questions that are susceptible to arbitration.

I do not agree with the pronouncement of many organizations and publicists engaged in the discussion of international arbitration to the effect that

every question between nations should be arbitrated. This is a very simple and all-inclusive formula but it will not stand the test of careful examination, and never has and never can be universally adopted. Let us consider for a moment what questions are susceptible of arbitration and can be submitted by nations to the decision of an international court. They are exactly the same kind of questions as can be arbitrated between citizens of the United States or submitted to the decision of a local court under our form of government, that is to say, they are questions arising under contract or under the law of the land. Applying this analogy in international relations, we find that the questions which are susceptible of arbitration or impartial decision are those involving rights claimed under a treaty or under international law. A political question cannot be arbitrated because there are no principles of law by which it can be decided, and unless there are relevant treaty provisions requiring construction, no nation can agree to arbitrate purely domestic questions like tariff, taxation, immigration, and, it may be said, all political questions involving the exercise of sovereignty within the nation's territorial limits. There are no positive rules of international law applicable to such questions to guide arbitrators in reaching a decision.

I am confident that the enthusiastic supporters of the theory that all questions between nations should be submitted to arbitration have not realized the vital difference between justiciable and political questions. Take, for example, the question of immigration which at times arouses bitter feelings between nations. On what principle could a government arbitrate this question, and what rules could be applied to guarantee justice to the disputants? It seems to me we must realize that so long as the world is composed of separate, sovereign nations, only those questions can properly be submitted to arbitration which, being justiciable in their nature, are susceptible of determination by the application of recognized rules of law or equity. Non-justiciable or political questions must, if they threaten to bring on hostilities, be adjusted through other means, such as conciliation, where a disinterested effort is made to reconcile conflicting points of view without finding necessarily that either party was in the wrong.

It is when arbitration cannot or will not be invoked by the parties that conciliation treaties have their greatest value for adjusting international irritations tending to inflame public opinion and imperil the peace of the world. One of the first of our treaties establishing a procedure for conciliation was the so-called Knox treaty of 1911. That treaty, which was also a treaty of arbitration, was never proclaimed by the President because of certain reservations attached by the Senate in advising and consenting thereto. These reservations, however, did not affect the conciliation provisions of the treaty and need not be discussed in this connection. Our next conciliation treaties were the Bryan treaties to which I have already referred. The first of these was signed in 1913 and there are 18 of them now in force. In 1923 we became parties to two other conciliation treaties, namely, that

signed at Washington on February 7, 1923, between the United States and the 5 Central American Republics, and that signed at Santiago on May 3, 1923, between the United States and 15 Latin American countries. Both of these treaties have been ratified by the United States. They are similar to the Bryan treaties, the principal point of difference being as to the manner of constituting the commissions of inquiry.

The Bryan treaties provide, you will recall, that any dispute shall, when ordinary diplomatic proceedings have failed and the parties do not have recourse to arbitration, be submitted for investigation and report to a Permanent International Commission composed of five members, two of whom, a national and a non-national, being designated by each of the two governments, and the fifth member by agreement. The commission is bound to report within a year from the date on which it takes jurisdiction of the case, and the parties agree not to resort to any act of force prior to the commission's report, reserving, however, full liberty of action with respect to the report itself.

The United States has been a party to conciliation treaties for 15 years, and while there has never yet been an occasion for invoking them, I know of no reason why this country should object to an inquiry by a commission of conciliation if war is threatened. It is claimed in some quarters that purely domestic questions might be inquired into by these commissions of conciliation. While I cannot conceive that any government would feel justified in demanding an inquiry by the commission into a matter solely within the domestic jurisdiction of another government, I do not feel that the point is material. The object which is sought to be attained by conciliation treaties is the prevention of war, and in my opinion any government can well afford to submit to inquiry any question which may threaten to involve it in the horrors of war, particularly when, as in the Bryan and other treaties I have just mentioned, the findings of the commission have no binding force and to be effective must be voluntarily accepted.

The world is more and more alive to the necessity of preventing war, and I think it is significant that the Sixth International Conference of American States which recently concluded its labors at Habana adopted two anti-war resolutions one of which contains the unqualified statement that "the American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations," which, it is interesting to note, is the language of M. Briand's original proposal to me. The other resolution contains the statement that "war of aggression constitutes an international crime against the human species" and the declaration that "all aggression is considered illicit and as such is declared prohibited." It is the former resolution that I regard as of the greatest interest at this time because, of the 21 states represented at the Habana Conference, 17, while members of the League of Nations, were not prevented by such membership from joining in an unqualified declaration against war. This general resolution is also

important because it endorses the principle of compulsory arbitration for justiciable disputes and provides for the calling of a conference in Washington within a year to draft appropriate treaties of arbitration and conciliation.

I have discussed at some length the provisions of the new arbitration treaty with France. I have also outlined the scope and purpose of the many conciliation treaties which the United States has concluded with other governments. I know of but one other form of treaty which can be concluded for the purpose of preventing war and that is a treaty in which the parties specifically bind themselves not to resort to war. It is this kind of treaty which people have in mind when they discuss treaties for outlawing war, and it is a novel idea in modern international relations.

As you are all aware, in a communication dated June 20, 1927, M. Briand proposed to the United States the conclusion of a bilateral treaty under the terms of which France and the United States would agree to renounce war as an instrument of their national policy towards each other. This treaty provided, first, that—

> The high contracting powers solemnly declare, in the name of the French people and the people of the United States of America, that they condemn recourse to war and renounce it respectively as an instrument of their national policy towards each other.

and, secondly, that—

> The settlement or the solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between France and the United States of America, shall never be sought by either side except by pacific means.

This important and inspiring proposal was carefully and sympathetically studied by the Government of the United States. While we might well have hesitated to take the initiative in proposing such a treaty to Europe, the invitation from France afforded us an opportunity to examine anew the whole question of world peace and to determine in what practical manner we could best coöperate. We made that examination, and, in my note of December 28, 1927, after expressing the sincere appreciation of the United States for the offer which France had so impressively submitted, I warmly seconded M. Briand's proposition that war be formally renounced as an instrument of national policy, but suggested that instead of giving effect thereto in a bilateral treaty between France and the United States, an equivalent multilateral treaty be concluded among the principal Powers of the world, open to adherence by any and all nations, thus extending throughout the world the benefits of a covenant originally suggested as between France and the United States alone. The Powers which I suggested be invited in the first instance to join with France and the United States in such a treaty were Great Britain, Germany, Italy, and Japan.

France, I am happy to say, promptly agreed in principle to the idea of a multilateral treaty. France suggested, however, that the treaty provide

only for the renunciation of wars of aggression, explaining that while France could conclude a bilateral treaty with the United States providing for the unqualified renunciation of war, the conclusion of a similar multilateral treaty presented certain difficulties in view of the obligations of France under the Covenant of the League of Nations, treaties such as those signed at Locarno in October 1925 and other international conventions relating to guaranties of neutrality. The French Government also pointed out that in September 1927 the members of the League of Nations adopted a resolution condemning aggressive war as an international crime. In these circumstances France expressed the opinion that the common object of the two governments could best be attained by framing the proposed anti-war treaty so as to cover wars of aggression only. I have not been able to agree to that reservation.

My objection to limiting the scope of an anti-war treaty to mere wars of aggression is based partly upon a very real disinclination to see the ideal of world peace qualified in any way, and partly upon the absence of any satisfactory definition of the word "aggressor" or the phrase "wars of aggression." It is difficult for me to see how a definition could be agreed upon which would not be open to abuse. The danger inherent in any definition is recognized by the British Government which in a memorandum recently submitted to the Subcommittee on Security of the Preparatory Committee on Disarmament of the League of Nations discussed attempted definitions of this character, and quoted from a speech by the British Foreign Secretary in which Sir Austen Chamberlain said: "I therefore remain opposed to this attempt to define the aggressor because I believe that it will be a trap for the innocent and a signpost for the guilty."

I agree with Sir Austen on this point. It seems to me that any attempt to define the word "aggressor" and by exceptions and qualifications to stipulate when nations are justified in going to war with one another, would greatly weaken the effect of any treaty such as that under consideration and virtually destroy its positive value as a guaranty of peace. And in my last note to the French Government I stated expressly that I could not avoid the feeling that if governments should publicly acknowledge that they could only deal with this ideal of world peace in a technical spirit and must insist upon the adoption of reservations impairing if not utterly destroying the true significance of their common endeavors, they would be in effect only recording their impotence to the keen disappointment of mankind in general.

In my note of February 27, 1928, I also discussed at some length the question raised by the Government of France whether, as a member of the League of Nations and as a party to the treaties of Locarno and other treaties guaranteeing neutrality, France could agree with the United States and the other principal world Powers not to resort to war in their mutual relations without *ipso facto* violating their present obligations under those treaties. I pointed out that if those obligations could be interpreted so as to permit France to conclude with the United States alone a treaty such as that

proposed by M. Briand, it was not unreasonable to suppose that they could be interpreted with equal justice so as to permit France to join with the United States in offering to conclude an equivalent multilateral treaty with the other principal Powers of the world. I stated that it seemed to me that the difference between the bilateral and multilateral form of treaty having for its object the unqualified renunciation of war, was one of degree and not of substance, and that a government able to conclude such a bilateral treaty should be no less able to become a party to an identical multilateral treaty, since it could hardly be presumed that members of the League of Nations were in a position to do separately something that they could not do together.

In these circumstances I expressed the earnest hope that France, which admittedly perceives no bar to the conclusion of an unqualified anti-war treaty with the United States alone, would be able to satisfy itself that an equivalent treaty among the principal world Powers would be equally consistent with membership in the League of Nations, adding that if members of the League of Nations could not, without violating the terms of the Covenant, agree among themselves and with the United States to renounce war as an instrument of their national policy, it seemed idle to discuss either bilateral or multilateral treaties unreservedly renouncing war. In that connection I called attention to the fact that the 21 American States represented at the recent Habana Conference adopted a resolution unqualifiedly condemning war as an instrument of national policy in their mutual relations, and to the fact that 17 of the 21 States represented at that Conference are members of the League of Nations.

I concluded my note with the unequivocal statement that the Government of the United States desires to see the institution of war abolished and stands ready to conclude with the French, British, Italian, German, and Japanese Governments a single multilateral treaty open to subsequent adherence by any and all other governments binding the parties thereto not to resort to war with one another. This is the position of the Government of the United States, and this is the object which we are seeking to attain.

I cannot believe that such a treaty would violate the terms of the League Covenant or conflict necessarily with the obligations of the members of the League. Even Article 10 of the Covenant has been construed to mean that League members are not inescapably bound thereby to employ their military forces. According to a recent statement by the British Government, many members of the League accept as the proper interpretation of Article 10 a resolution submitted to the Fourth Assembly but not formally adopted owing to one adverse vote. That resolution stated explicitliy:

> It is for the constitutional authorities of each member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces.

I earnestly hope, therefore, that the present negotiations looking to the conclusion of an unqualified multilateral anti-war treaty may ultimately achieve success, and I have no doubt that if the principal powers of the world are united in a sincere desire to consummate such a treaty, a formula can be devised which will be acceptable to them all.[4] Since, however, the purpose of the United States is so far as possible to eliminate war as a factor in international relations, I cannot state too emphatically that it will not become a party to any agreement which directly or indirectly, expressly or by implication, is a military alliance. The United States cannot obligate itself in advance to use its armed forces against any other nation of the world. It does not believe that the peace of the world or of Europe depends upon or can be assured by treaties of military alliance, the futility of which as guarantors of peace is repeatedly demonstrated in the pages of history.

I must not claim that treaties of arbitration and conciliation, or even treaties explicitly renouncing war as an instrument of national policy, afford a certain guaranty against those conflicts between nations which have periodically broken out since the dawn of world history. In addition to treaties there must be an aroused public conscience against the utter horror and frightfulness of war. The peoples of the world must enjoy a peaceful mind, as it has been said, and treaties such as those I have discussed this evening, and the efforts of statesmen to advance the cause of world peace, can only be regarded as a portion of the problem. I am not so blind as to believe that the millennium has arrived, but I do believe that the world is making great strides toward the pacific adjustment of international disputes and that the common people are of one mind in their desire to see the abolition of war as an institution. Certainly the United States should not be backward in promoting this new movement for world peace, and both personally and officially as Secretary of State, I shall always support and advocate the conclusion of appropriate treaties for arbitration, for conciliation, and for the renunciation of war.

[4] As a result of a conversation of the Secretary of State with the French Ambassador on April 7, 1928, the United States and France agreed upon the immediate submission to Great Britain, Germany, Italy and Japan of the entire correspondence which has passed between the United States and France on the subject of a multilateral anti-war treaty, for the consideration and comment of those Powers. (State Department press notice, April 7, 1928.)

SAFEGUARDING PEACE—A CONSTRUCTIVE SUGGESTION

By Charles Cheney Hyde

Hamilton Fish Professor of International Law and Diplomacy Columbia University.

The United States finds its chief assurance of safety in its own strong arm and in its geographical position; for it has few treaties that offer solid barriers against conflict, and none that bind the other party not to wage war upon it should some conditions arise.

In seeking safeguards against war numerous obstacles have checked our progress. We have not as a people been certain as to what we ought to give up for the sake of peace. We have not been clear as to what should be accepted as feasible and desirable substitutes for war. We have lacked conviction as to the efficacy of some modes of adjustment, and have overlooked the potentialities of others; and we have been reluctant to agree to experiment. We have rigidly declined to agree to make war against a state that becomes a belligerent in violation of its covenant, without considering whether there may not be some other unobjectionable and yet effective means of penalizing such a wrongdoer.

Under such circumstances our Presidents have found it difficult to make progress. Recent events have, however, raised fresh hopes. With Europe we are discussing the conditions of abandoning war as an instrument of national policy. We are proclaiming the need of multilateral treaties appropriate to that end. With France and other Powers we are renewing conventions that record fresh and broad commitments in favor of compulsory arbitration. The resolution adopted at the Sixth Pan American Conference on February 18th, shows that the states of the western hemisphere have fervent desires for peace.

It is not here sought to discuss what kinds of wars or what belligerent activities the United States should endeavor to persuade any other Powers to agree to give up. It is submitted, however, that even when states are far from agreement as to these matters, there may still be within their grasp practical means of removing armed conflict from the horizon.

You can agree to avert war even if you cannot agree not to make war. You can agree to endeavor to adjust controversies by amicable methods and so postpone the day—perhaps forever—of the armed conflict which you are not prepared to agree never to enter. Moreover, you may gain the right by agreement to make hard the way of him who will not employ or abide by amicable methods, and that without becoming his enemy.

The practical question of the hour seems to be, therefore, whether our own

country may propose an arrangement acceptable to other countries as well as to itself, whereby dangers of war may be greatly minimized if not completely averted.

Any constructive proposal designed to make a successful appeal to those possessed of the treaty-making power of the United States must reckon with the following conditions: first, that this nation has a passion for independence; secondly, that it will not agree to be drawn into a war between other states; and thirdly, that it will not delegate to any outside body the right to determine what is the nature of a controversy or how it ought to be adjusted. These are facts. The question is, therefore, whether full respect for them necessarily closes the door against some general arrangement by which the United States may coöperate for the establishment of fresh and solid barriers against war. May our country, while faithful to the principles to which it avows attachment, unite with Europe and South America and Asia for the maintenance of peace by methods which are agreeable to itself and which do not interfere with arrangements by which many states of those continents are already bound? While we may not seek as a nation to create any new international organization, we have no desire to embarrass the good offices of one that already exists; and we can not act as though it did not exist and as though no states were committed to its policies for peace.

In searching for feasible modes of amicable adjustment one must take careful note of the common unwillingness of governments to agree to settle some differences by certain well known means. It would be easy to assert that substantially all issues between states should be submitted to arbitration. Statesmen will not, however, agree to arbitrate all controversies that cannot be settled by diplomacy, and least of all, many of those which are notoriously productive of war. Even when there is a readiness to entrust claims of legal right to an international court, there is a strong disposition to insist upon reservations. Moreover, governments encounter much difficulty in concluding treaties which draw a clear line between what is and what is not arbitrable. Our own country is absolutely unwilling to confide the decision of that question to any outside body. Thus, our new treaty with France, signed February 6, 1928, which probably indicates the full extent to which the Senate would commit the nation to compulsory arbitration, makes reservation of domestic questions, and places upon the Senate as well as the President the burden of determining in behalf of the United States, whether a particular question falls within the scope of the convention.

States should of course be encouraged to accept as far as possible the principle of compulsory arbitration. The practical difficulty is, however, that many controversies of gravest concern arise from activities where policy and law are so knit together as to be inseparable. When they are, governments are highly reluctant to entrust the questions at issue to the decision of courts or other bodies composed chiefly of foreigners of whatsoever nationality. In such situations the decisions of neutral judges are not wanted; and

even the recommendations of neutral conciliators may be highly distasteful. Again, statesmen dislike to be called upon to submit to any international forum questions growing out of the exercise of what they deem to be the domestic rights of their countries. Moreover, the various issues for the solution of which states balk at arbitration, and may be even distrustful of neutral conciliators, defy neat classification. They will not fit into academic formulas. They grow out of clashes of interest as well as clashes of right. A state may, for example, be aroused to fury by the conduct of its neighbor whose action is not illegal under international law. Again, the assertion by a state of its so-called sovereign rights in respect to a matter of seemingly domestic import may be challenged by another as a menace to its safety.

In reality, no question is a domestic one when it serves to align states in opposition to each other. This grim fact must not be ignored. If a state declines to permit any international court or commission to judge of the propriety of its conduct when policies close to its heart are challenged, or when in the exercise of its rights it causes injury to its neighbor, the refusal breeds certain strife, unless some friendly alternative is proposed. Postures which scorn the need of that alternative endanger peace. They beget controversies that diplomats are impotent to adjust. They create national resentment. They transform friends into enemies; they are the germs of war.

The question is not, therefore, what issues are fairly capable of adjustment by arbitration. That is doubtless an interesting inquiry; but it is essentially academic. The question is rather, whether there is today available a practical mode of adjusting amicably those very controversies, howsoever described and of whatsoever character, which states will not agree to arbitrate and which are the usual precursors of war. To be more specific, the question is, from an American point of view, whether there is a mode of adjustment which the United States might wisely propose for general adoption through a multilateral treaty. By a process of elimination some conclusions suggest themselves.

No body or entity composed chiefly of neutral persons is likely to make strong appeal to some states at variance over matters of gravest concern. If neutral judges of lofty character and thorough training, and bound, moreover, to respect the law, are not to be deemed eligible or competent, neutral commissioners or conciliators, not so bound, may not be held in higher esteem. Their findings of fact may indeed be useful and accordingly respected; but it may be feared lest their recommendations or mediatory proposals be contemptuous of cherished rights, and although not possessing the character of an arbitral award, be, nevertheless, sufficiently influential to cause the relinquishment of claims of great merit. In this connection, it should be recalled that what caused the Scandinavian States in 1920 and 1922 to press for the approval by the League of Nations of treaties providing for adjustment by conciliation of differences that might not prove to be arbitrable, and to lead Europe to their way of thinking, was a desire to avoid

or postpone as far as possible recourse to the Council of the League, which under the terms of the Covenant was the normal alternative. As the United States is not obliged, in any contingency, to accept the recommendations of that body, the obligatory use of a commission of conciliation composed chiefly of neutral nationals may appear less desirable to it than to numerous other states. While the United States may well agree to invoke the aid of a commission of inquiry composed chiefly of neutral persons for purposes of investigating facts and reporting thereon, according to the sensible plan of the Bryan treaties for the advancement of peace, it may be quite unwilling to agree, through a multilateral treaty, to go the whole length and seek the recommendations of such a body for the solution of some controversies that might greatly endanger peace. It would not, for example, welcome the recommendations of neutral commissioners on a question whether its intervention in the affairs of another state was justified, or whether its exclusion of immigrants from a particular country was improper, or whether a treaty designed to safeguard the Panama Canal was beyond the competence of a contracting party.

If neither neutral arbitrators nor neutral conciliators are to be utilized in the solution of war-producing controversies, what alternative remains? If such persons are deemed ineligible, who are better qualified? Is there any type or group of men to be regarded as fit to decide or to recommend, and whose decisions or recommendations are to be sought and respected for the solution of dangerous questions?

As early as 1785, John Jay appeared to think that there was. He proposed the use of a joint commission composed of an equal number of representatives of the United States and Great Britain for the adjustment of all disputes with Great Britain respecting the northeastern boundary line. The decision of the commission, which was to act in a judicial capacity, was to be "absolute, final, and conclusive, between the parties." In 1790, his report was submitted by President Washington to the Senate. No arrangement was, however, made in pursuance of these suggestions. The principle was applied, nevertheless, in the Treaty of Ghent.

It will be recalled that by means of a joint commission the Alaskan boundary dispute was adjusted, in 1903, under circumstances when it would have been impossible to secure the approval of the United States to the arbitration of the issue. By the convention with Great Britain of January 11, 1909, concerning the boundary waters between the United States and Canada, there was established a so-called International Joint Commission clothed with power to pass upon certain cases involving the use or obstruction or diversion of boundary waters, and authorized also to act as a commission of conciliation in the solution of questions which the United States and Canada might agree to submit to it. Secretary Hughes, impressed by the potentialities of such bodies, declared on September 4, 1923, in an address before the Canadian Bar Association at Montreal:

> I may take the liberty of stating as my personal view that we should do much to foster our friendly relations and to remove sources of misunderstanding and possible irritation, if we were to have a permanent body of our most distinguished citizens acting as a commission, with equal representation of both the United States and Canada, to which automatically there would be referred, for examination and report as to the facts, questions arising as to the bearing of action by either government upon the interests of the other, to the end that each reasonably protecting its own interests would be so advised that it would avoid action inflicting unnecessary injury upon its neighbor.

Again, on February 16, 1928, at the Sixth Pan American Conference at Havana, Mr. Hughes, as chairman of the American delegation, proclaimed his faith in the value of joint commissions as agencies competent to recommend the solution of various delicate questions which states might think impinged upon the exercise of their internal authority and which they might be unwilling to submit to arbitration.

The body best calculated to make an effective appeal to the sensibilities of outraged states, or to which they may be expected to entrust their gravest differences, embracing those such as Mr. Hughes has described, must be composed solely of representatives of those states. A joint commission, comprising an equal number of representatives of opposing states is thus the only type of international agency which can meet this requirement. A majority vote upon a decision or recommendation entails a yielding by at least one of the representatives of the state deemed to be in the wrong. Each party in submitting its case is assured that there will be no report or decision adverse to its pretensions which lacks the support of at least one of its own representatives; and it, accordingly, has faith that they will sacrifice no claim which is inherently sound or entitled to full respect. There is always of course the possibility of an even division of opinion. This factor is not to be underestimated. Nevertheless, the possibility of a deadlock through the steadfastness of each group of commissioners to the cause of its own state may encourage, rather than deter, the opposing countries to utilize such an agency, especially if the issue be of the utmost gravity, and when the views of neutral jurists or commissioners are not welcomed.

For these reasons it is believed that the United States might wisely endeavor to incorporate in a multilateral treaty a provision for the use of permanent joint commissions, not in any sense as a substitute for arbitration, or for other acceptable agencies, but rather to fill that broad gap where at present the only feasible alternative is likely to be the sword.

As a practical matter of much importance, it is believed that a treaty should be flexible in its operation—not indicating what kinds of questions should be adjusted by arbitration or even by commissions of inquiry, but rather providing that controversies which prove incapable of settlement by arbitration or judicial process, or as a consequence of investigation or of any other method agreed upon, be referred to a permanent joint commission.

By this process, questions of every character are taken care of, the method of settling a particular issue depending upon the exigencies of the hour as well as upon the character of what is involved. As a result, recourse to arbitration is encouraged. There is an inducement to test by experiment the value of international courts for the solution of grave differences. But there is no obligation to do so. The freedom of the parties to deal with each question by what they regard as the most appropriate process is not undesirable, so long as they are faced with the ultimate duty to make use of a joint commission when other methods have failed. In any event, however, war is postponed until the efforts of such a body have proved abortive. It is true that the contingency of armed conflict is not wholly removed, but it is at least removed far from the horizon, and very much farther than our own country has thus far been able to agree to remove it.

Suppose a party to such a treaty breaks its covenant and goes to war before attempting to exhaust arbitration, or the good offices of a joint commission. What then? Europe today seems ready to assume heavy burdens against such a covenant-breaker. The United States, however, as has been noted, is unwilling to agree to do anything that, even in such a contingency, will impair its neutral status. If in the course of a war between other states the United States remains a neutral, it cannot under the existing law modify its duties as a neutral towards any state that enters the conflict. The burden of impartiality is a heavy one. The United States may, however, through an appropriate multilateral treaty, gain some freedom as a neutral, at least with respect to each contracting party which subsequently goes to war. By this means it may acquire the right, while it remains outside of a conflict, to be free from any duty not to penalize the treaty-breaking belligerent. This point is believed to be of the utmost importance.[1] It merits the most serious consideration of those responsible for the foreign relations of a country situated as is our own at the present time.

The bare withholding of military aid from a particular belligerent is a weapon of untried and unmeasured power. At the present time a belligerent state may, without violating international law, supply itself from neutral territory with most of the articles necessary to military success. If possessed of sufficient military strength it may utilize the desired resources of neutral territory substantially as though it were a base of operations. Ultimate success may, therefore, depend upon the fullness of the neutral storehouse. The government of a neutral state is permitted by law to remain passive while the people occupying its territory become for many purposes participants in the conflict. Wars are today won or lost according to the aid

[1] It was discussed by this writer in an address on "The Part of International Law in the Further Limitation of Naval Armament," delivered under the auspices of the Association of the Bar of the City of New York, January 21, 1926, printed in this JOURNAL, Vol. XX, p. 237. It has also been advocated by Dr. Nicholas Murray Butler and Prof. Joseph P. Chamberlain.

which comes from neutral territory. Thus the decisive obstacle to the success of a treaty-breaking belligerent may prove to be its inability to obtain from neutral territory such aid as it may, under the existing law, readily procure therefrom. It is worth considering, therefore, whether the United States should endeavor to emphasize not only the foregoing fact, but also the real value of a general arrangement with groups of states of any continent, enabling a neutral Power to acquire the right without losing its neutral status (and possibly also undertake the burden) to withhold the fruits of its territory, especially in the form of military aid, from a contracting state which becomes a belligerent in violation of its covenant. Our own country is of course unconcerned with the scope of the undertakings of other states through arrangements of their own, to penalize through joint action treaty-breaking belligerents, so long as the United States is not itself a joint obligor, and such action is not directed against itself. The United States must, however, feel much concern as to practical methods which it itself can apply whereby it can obtain solid assurance for its own sake that a treaty designed to preserve peace and do justice shall be scrupulously respected. We have a vital national interest in the matter that taxes our resourcefulness and persuasiveness to bring about a situation whereby the United States may keep aloof from conflicts that are not to its liking and at the same time exercise a powerful weapon against a faithless and perhaps a ruthless belligerent. We have the obvious right when a neutral to withhold impartially the fruits of our territory from both or all belligerents. But we need something more—the right, under a specified contingency, to be partial and to take sides without violating a legal duty towards the belligerent whom we deem it just to penalize and without becoming its enemy. The acquisition of that right calls for a treaty.

It is suggested, therefore, that the United States might well propose that a party to a multilateral treaty for the advancement of peace be permitted to withhold military aid of any kind, such as some of the natural resources of its own territory, from any other contracting party which became a belligerent in violation of its undertakings to exhaust amicable methods of adjustment. The United States might, moreover, deem it feasible and desirable to agree to exercise the right to withhold aid from such an offender, if it could do so with the distinct understanding that such action should not impair its neutral status. In this connection it should be noted that the right, and perhaps also the duty of a neutral, under an appropriate treaty, to withhold such aid would depend upon a situation the existence of which would not be difficult to ascertain—whether there had been in fact a breach of the duty to exhaust an amicable mode of settling a dispute. It ought to require the aid of no outside body to enable the neutral to determine whether the covenant had been broken.

Here then are two simple bases for a multilateral arrangement believed to be appropriate for the consideration of states of any continent which may be

ready to contract with the United States. They are designed, in the first place, to postpone armed conflict until essentially practical agencies for amicable adjustment of war-producing controversies have failed to bring about accord; and, secondly, to enable a country zealous to keep out of war to retain both its neutral status and its right to penalize a covenant-breaking belligerent. These bases are believed to embody what the United States could fairly propose to the outside world. A multilateral treaty declaratory of them would involve no relinquishment of independence by the United States or any other party; it would beget no new international organization; it would place no unreasonable burden on states devoted to the maintenance of peace; it would create no entangling alliance; it would mark no departure from the traditional policies of our own country; it would cause no embarrassment to states loyal to the League of Nations.

By way of summary, therefore, it is submitted that the United States might well consider proposing to other interested Powers the following bases for a multilateral treaty:

I.

An undertaking that when a controversy between two signatory states is not settled by direct negotiation, or as a result of adjudication before a competent international tribunal, or in consequence of the use of any other amicable means on which they may be agreed, it shall be referred to a joint commission composed exclusively of an equal number of representatives of the states at variance for final decision or recommendation, as the parties may be able to agree.

II.

An agreement that a signatory state may, without being charged with unfriendly or unneutral conduct, exercise the right (and possibly accept the obligation) to forbid the removal from its territory of munitions of war and other forms of essentially military aid which it has reason to believe are destined for the use of any other signatory state which, in the judgment of the former, goes to war in violation of the foregoing undertaking.

TREATMENT OF ENEMY PRIVATE PROPERTY IN THE UNITED STATES BEFORE THE WORLD WAR

By Edgar Turlington

Special Counsel, United States Agency, United States–Mexican Claims Commission

According to the theory accepted by the American and English courts, and by nearly all the American and English writers on international law, war between nations is war between their individual citizens.[1] It makes of the citizens or subjects of one belligerent, enemies of the citizens or subjects of the other.[2] The whole nation is embarked in one common bottom and must be reconciled to submit to one common fate.[3] The government at war is the representative of the will of all the people and acts for the whole society.[4] According to the rival theory, which, though first put forward by Rousseau merely as a philosophical principle, has been accepted by a large number of Continental jurists as a fundamental principle of international law, war is a relation between states in which individuals are enemies only accidentally, not as men nor even as citizens, but simply as soldiers.[5] Under the Anglo-American theory, the private property of the nationals of each belligerent, on land or sea, is in principle subject to capture and confiscation by the other belligerent.[6] The application of the Continental theory, on the other hand, involves, at least in tendency, the exclusion of all interference with the persons and property of individuals, except in so far as they are engaged in the service of the state, or enrolled in its fighting forces, or, on a broader construction, except in so far as they contribute to the prosecution of the war.[7]

For practical purposes, the conflict in legal theory is less serious than might be supposed, since the theory accepted by the majority of Continental jurists and Continental states is, in practice, subject to the doctrine of "necessity," a doctrine which does not obtain in Anglo-American jurisprudence,[8] and since the United States and Great Britain have, in practice,

[1] Sutherland *v.* Mayer, 70 L. Ed. 574 (1925).

[2] Herrera *v.* United States, 222 U. S. 558 (1911).

[3] *The Rapid*, 8 Cranch, 155 (1814).

[4] Kent, Commentaries, Abdy's ed., p. 174.

[5] Rousseau, *Du Contrat Social*, I, c. 4; Pitt Cobbett, Leading Cases on International Law, 3d ed., Vol. 2, p. 16.

[6] Fairfax *v.* Hunter, 7 Cranch, 620 (1813); Miller *v.* United States, 11 Wall. 268 (1871); Herrera *v.* United States, 222 U. S. 558 (1911).

[7] Pitt Cobbett, *op. cit.*, p. 16; Hall, International Law, p. 64 *et seq.*; Holland, War on Land, p. 12.

[8] Latifi, Effects of War on Property, p. 49.

upon grounds of policy, admitted considerable modifications of the rigor of the theory to which they adhere. It is manifestly important, however, in the discussion of the treatment of private enemy property in the United States, to bear in mind the fact that any tendency which may be noted toward non-interference with such property of various kinds and under various circumstances, is, from the point of view accepted in the United States, as well as in Great Britain, a relaxation of the strict legal rights, and not, as might be alleged by the exponents of the other point of view, an abandonment of illegitimate pretensions on the part of the state.

The history of the treatment of enemy property in the United States begins with a marked divergence between what was actually done and what was believed to be desirable. On the one hand, as early as September, 1776, it was decided by the Continental Congress, doubtless under the influence of the philosophical principle of Rousseau regarding the relation of the individual to the state in time of war, that the plan of treaties to be proposed to the King of France should include an article allowing to the merchants of each nation established in the territory of the other six months after the outbreak of war for the removal of their "goods and merchandises." [9] On the other hand, on November 27, 1777, the Congress passed the following resolution: [10]

> Resolved, That it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate therein, of such of their inhabitants and other persons who have forfeited the same, and the right to the protection of their respective states, and to invest the money arising from the sales in continental loan office certificates, to be appropriated in such manner as the respective states shall hereafter direct.

The response of the several States to this recommendation of Congress is indicated in the enumeration of confiscatory measures of the States, furnished by Mr. Jefferson, Secretary of State, to Mr. Hammond, Minister of Great Britain, on May 29, 1792,[11] and in the somewhat more extensive list of confiscatory measures read to the Senate by Senator Sumner in the course of the discussion of the confiscation bill on May 19, 1862. Mr. Jefferson's list shows 52 general confiscatory measures adopted in twelve of the thirteen States, applying to property of every kind, including in one case debts due to British subjects. Senator Sumner's list shows general confiscatory measures adopted in each of the thirteen States, to the total number of 88. A more circumstantial account of these measures was presented by Senator Howard in the course of the debates in 1862.[12] That the confiscation of private property by State action was deemed by the Continental Congress

[9] 3 Secret Journals of Congress, 6, 18, 27.
[10] IX Journals 971; cited by J. Reuben Clark, Emergency Legislation, p. 212.
[11] 1 American State Papers, 201–237.
[12] 32 Congressional Globe, 1715.

to have been justified, is clear from the resolutions of September 10, 1782 in part as follows:[13]

> Resolved, That . . . in the opinion of Congress, the great loss of property which the citizens of the United States have sustained by the enemy will be considered by the several states as an insuperable bar to their making restitution or indemnification to the former owners of property, which has been or may be forfeited to or confiscated by any of the states.

Thomas Jefferson, moreover, in the correspondence with the British Minister at Washington, already referred to, quoted Bynkershoek as authority for the assertion that the state of war permits a nation to seize enemy property of every kind within its own limits. Mr. Jefferson's concern was to justify the confiscation of immovable property, which he said every nation would wish to exempt from confiscation if practicable. The "circumstances of our war" were, however, "without example; excluded from all commerce, even with neutral nations, without arms, money, or the means of getting them abroad, we were obliged to avail ourselves of such resources as we found at home."

The question of the legality of the confiscatory measures of the States, especially in relation to debts, was eventually brought to the attention of the United States Supreme Court, in the case of Ware *v.* Hylton.[14] It is interesting to note that in that case, John Marshall, appearing as counsel for the defendant, urged upon the court the argument that the right to confiscate debts arises from the nature and operation of government and from the fact that property is the creature of civil society and as such subject to the control of civil institutions. More significant, however, than Marshall's argument were the declarations of the members of the court concerning the state of international law, as they conceived it, with respect to the confiscation of enemy private property, and, specifically, of debts. Mr. Justice Chase said:

> It appears to me, that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever), wherever found, whether within its territory, or not. . . .
>
> The right to confiscate the property of enemies, during war, is derived from a state of war, and is called the right of war. This right originates from self-preservation, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. Justice also is another pillar on which it may rest; to wit, a right to reimburse the expense of an unjust war. (Vatt. lib. 3, c. 8, No. 128, and c. 9, No. 161.)

Mr. Justice Patterson:

> I shall not . . . controvert the position, that by the rigor of the law of nations, debts of the description just mentioned may be confiscated.

[13] 3 Secret Journals of Congress, 206.

[14] 3 Dall. 199 (1796).

> This rule has by some been considered as a relic of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nations, and perhaps, is generally exploded at the present day in Europe.

Mr. Justice Iredell:

> Whatever doubt might have been entertained, by reasoning on the particular examples of Grotius and Puffendorf, Bynkershoek (who, I believe, is alone, a very great authority) is full and decisive in the very point, as to a general right of confiscating debts of an enemy. His doctrine I take to be this, that the law of nations authorizes it, unless in former treaties between the belligerent powers, there be particular stipulations to the contrary.

Mr. Justice Wilson:

> By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable; and we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war which our revolution produced.

Mr. Justice Cushing: "I shall not question the right of a state to confiscate debts."

While the several States were thus in practice confiscating enemy private property, inclusive of debts and immovables, and justifying their action on moral and legal grounds, progress was steadily being made toward the building up of a system of treaties restricting the exercise of the right of confiscation as between the United States and the other parties to these treaties. The first of these treaties was signed with France in 1778. It provided, in Article XX, as follows:

> For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the two nations, six months after the proclamation of war shall be allowed to the merchants in the cities and towns where they live for selling and transporting their goods and merchandizes; and if any thing be taken from them, or any injury be done them within that term by either party, or the people or subjects of either, full satisfaction shall be made for the same.

As this treaty was concluded without stipulation as to its duration, it may be fairly inferred that the United States was disposed to enter into permanent undertakings with all friendly countries to the same effect. Such an undertaking was, in fact, incorporated in the permanent treaty signed with The Netherlands in 1782, and in the treaties signed with Sweden in 1783, with a stipulated duration of fifteen years, and Prussia in 1785, with a stipulated duration of ten years; the only substantial difference being that the period allowed for the withdrawal of resident merchants and their effects was extended to nine months in each of the last three treaties. This extension was in accordance with the resolution of Congress on May 7, 1784,[15] in which

[15] 3 Secret Journals, 484.

it was set forth that it would be advantageous that treaties specifying that period for withdrawal be concluded by the United States with Russia, the Court of Vienna, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia and the Ottoman Porte.

The treaty of peace with Great Britain, concluded in 1783, did not include a provision of the character above noted. It did, however, contain, in Article V, an agreement, which was not at the time expected by either side to have and did not in fact have practical results, that the Congress should "earnestly recommend it to the legislatures of the respective States, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects." This agreement to recommend certain action to the States is to be clearly distinguished from the agreement, in the fourth article of the treaty of peace, that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted." The latter agreement was intended to be binding upon the United States as a nation, and likewise upon the several States. Inasmuch as debts due to British subjects had been actually confiscated in only one of the States, it was expected that the execution of this agreement would offer no insuperable difficulties. It was largely with a view to securing the execution of the agreement that the provision was four years later inserted in the Constitution to the effect that the treaties then made, or to be made, should be the supreme law of the land. The fact that some of the States, either before or after the coming into effect of this provision, did obstruct the collection of debts due to British subjects during the war, made it necessary for the United States, some years later, to enter into an arrangement with Great Britain for the settlement of the debts directly between the two nations.

The singling out of debts for special treatment under the treaty of peace was indicative of the conviction of the responsible officials of the United States that this species of property enjoyed, or should enjoy, in the practice of nations, a peculiar sanctity. This conviction was emphatically expressed in some of the declarations already quoted from the opinions of the judges in the case of Ware *v.* Hylton. It was given equally emphatic expression in a report made to the first Congress on October 13, 1786, by Mr. Jay, the Secretary for the Department of Foreign Affairs. This report was in part as follows:[16]

> The next inquiry then is, whether belligerent powers have a right by express acts to extinguish, remit or confiscate such debts. Your secretary thinks, that the laws of nations strictly and rigidly considered will authorize it; but that since mankind have become more enlightened, and their manners more softened and humanized, it has not been common as well for those reasons, as for others suggested by

[16] 4 Secret Journals, 208.

the interest of commerce and mutual intercourse, to practice such severities.

Notwithstanding this opinion of the Secretary for the Department of Foreign Affairs, the question of the confiscation of debts was so far considered to be still a practical question as to be the subject of a prolonged debate in the third Congress of the United States in March, 1794. Congress being then greatly agitated by the incursions of British ships of war and privateers upon American commerce incident to the war with France, the following resolutions were submitted in the House of Representatives:[17]

> *Resolved*, That provision ought to be made, by law, for the sequestration of all the debts due from the citizens of the United States to the subjects of the King of Great Britain.
>
> *Resolved*, That provision ought, in like manner, to be made for the payment of all such debts into the Treasury of the United States, there to be held as a pledge for the indemnification of such of the citizens of the said States as shall have suffered from the ships of war, privateers, or from any person, or description of persons, acting under the commission or authority of the British King, in contravention of the Law of Nations, and in violation of the rights of neutrality.

The resolutions proposed do not appear to have passed. Some five months after the debate on these resolutions Mr. Jay, as the representative of the United States, presented to Lord Grenville a draft of a treaty of commerce. Article X of the treaty subsequently signed, one of the "permanent" articles, was as follows:

> Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies, which they may have in public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.

Article XXVI, which was to remain in force for twelve years, provided that

> If at any time a rupture should take place (which God forbid) between His Majesty and the United States, and (*sic*) merchants and others of each of the two nations residing in the dominions of the other shall have the *privilege of remaining* and continuing their trade, so long as they behave peaceably and commit no offence against the laws; and in case their conduct should render them suspected, and the respective Governments should think proper to order them to remove, the term of *twelve months* from the publication of the order shall be allowed them for that purpose, to remove with their families, effects and property, but this favor shall not be extended to those who shall act contrary to the established laws; . . .

[17] Annals of Congress, Vol. 4, 3d Cong., 1st Sess., pp. 535–556.

Here, then, in 1794, we find the United States willing to bind itself permanently in its relations with Great Britain to refrain from the sequestration or the confiscation of private debts and shares or moneys in public funds or in the banks; and willing, also, to incorporate in a permanent international instrument, a declaration that it is unjust and impolitic to destroy or impair property of this nature on account of national differences. It would be manifestly improper to infer from this action that the United States considered the law of nations to be settled at that time against the legality of the confiscation of debts. Moreover, it should be borne in mind that the branch of the government charged with the conclusion of treaties was not competent to declare the law of nations on this point. The function of declaring the law of nations on appropriate occasions devolves under our Constitution upon the courts, and that function, as regards the legality of the confiscation of debts, was performed two years after the signature of the treaty in question, in the case of Ware *v*. Hylton, to which reference has already been made. All that can be properly inferred from the language employed in this treaty is that the United States was convinced of the injustice and impolicy of the confiscation of the particular kinds of property dealt with in Article X of the treaty, and that it was probably disposed to bind itself, by treaties with other nations as well as Great Britain, to refrain from the confiscation of such property.

As to the significance of the provision of temporary duration embodied in Article XXVI of the treaty, it should be noted that this provision, in allowing British subjects, whether merchants or not, residing in the United States, to remain and continue their "trade," is considerably more liberal than the provision incorporated in the earlier treaties of the United States. That this provision was not then intended to be an indication of general policy of the United States, appears both from the fact that it was not embodied in one of the permanent articles of the treaty of 1794, and from the fact, which will subsequently appear in detail, that it was not repeated in any of the treaties of the United States during the next thirty years. The general policy of the United States in this period with reference to the treatment of enemy residents and their property may be regarded as having been indicated in the Congressional resolution of May 7, 1784, to which reference has already been made, authorizing agreements with various countries with respect to the withdrawal of resident enemy merchants and their property. There is no evidence so early as 1794 that the United States would have considered itself under any kind of obligation to permit such withdrawal in the absence of applicable treaty provisions.

The year 1795 saw the conclusion of a treaty of permanent obligation with Spain, containing substantially the same provision as the French treaty of 1778 with reference to resident enemy merchants. This treaty contained no provision with respect to the status of debts and other engagements upon the outbreak of war.

The beginning of the year 1798 found the United States and France in sharp controversy growing out of the French interferences with American property at sea. In the course of the discussions conducted at the French capital, the American plenipotentiaries, Charles C. Pinckney, John Marshall and Elbridge Gerry, took occasion to make the following observation in a note addressed to the Minister of Foreign Affairs of the French Republic on January 27, 1798:[18]

> It is a general rule, that war gives to a belligerent Power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle, there is, perhaps, no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages. This right, then, may be exercised on the goods of an enemy wherever found, unless opposed by some superior right.

The American plenipotentiaries were presumably not disposed to deny the restriction of this right by the then existing treaty of 1778. This restriction was, however, removed by an Act of Congress approved July 7, 1798, abrogating the treaty. It appears to have been mainly with a view to defining the status of French merchants in the event of the anticipated war with France that the Congress passed the Act of the previous day, July 6, 1798, which, as amended (by the deletion of the word "males") on April 6, 1918, provides as follows:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.
>
> When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation

[18] 2 American State Papers, 171.

> or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

The second of the paragraphs above quoted may fairly be regarded as indicating that it was the policy of the United States in 1798, apart from treaty provisions, to allow a reasonable time after the outbreak of war for the departure of resident alien enemies (whether merchants or not) and the recovery, disposal and removal of their goods.

The treaty of 1785 with Prussia having expired in 1796, a new treaty was concluded with that country in 1799. In this treaty the provision of the old treaty regarding the period of nine months for the withdrawal of resident merchants was retained.

In the following year, 1800, a new treaty was concluded with France, with a specified duration of eight years. In this treaty the period of six months for the withdrawal of persons and property after the outbreak of war was stipulated, in favor not only of merchants, but of other citizens and inhabitants as well. This treaty followed the British treaty of 1794 in forbidding the sequestration or confiscation of debts and of shares or moneys in the public funds or in banks. It did not, however, like the British treaty, contain a declaration as to the injustice or impolicy of the contrary practice.

The British treaty of 1794, as to its temporary provisions, including the provision with respect to the right of resident enemies to continue their residence, expired in 1807. The French treaty of 1800 expired in 1809. There appear to have been no other developments in the period between 1800 and 1812 which might have affected the practice of the United States with reference to enemy private property in this country.

The War of 1812 was initiated by the United States with extreme reluctance. The declaration of war against England was the culminating point in a controversy which had been conducted for a number of years with both England and France on the subject of interferences with American commerce through the enforcement of ordinances and decrees which those Powers had made with a view to injuring each other in the war then in progress. Opinion in the United States was divided as to whether war should be declared against England or France, since both countries had violated American rights with almost equal frequency and deliberateness. The declaration of war against England was a wholly unenthusiastic choice of enemies and it was accompanied or immediately followed by the designation of a commission to treat with England concerning terms of peace. The treaty provision which would have prohibited the confiscation of British property being no longer in effect, Congress was at liberty to repeal the Act of 1798 as regards British subjects and their property, and to deal as it might see fit with such property (other than debts, etc., which were protected by the permanent

engagement in Article X of the treaty of 1794). Instead of exercising its liberty to the detriment of British subjects, Congress passed an Act on July 6, 1812, which provided in part as follows:

> Sec. 6. *And be it further enacted*, That the President of the United States be, and he is hereby, authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States.

The liberality of this provision is especially remarkable in view of the fact that at the time it was made the British Government was proceeding, in accordance with its uniform practice, to seize American ships and cargoes found in British ports.

While the property found in the United States belonging to non-resident British subjects was, of course, not protected from confiscation either by the Act of 1798 or by that of July 6, 1812, it does not appear that such property was in fact seized with a view to confiscation, except in the case of Brown *v.* United States,[19] which came before the Supreme Court in 1814. In that case the court made a historic decision which has doubtless influenced the subsequent practice not only of the United States but of other nations as well.

The property involved in the case of Brown *v.* United States was pine timber which had been purchased in this country by non-resident British subjects and detained on board a vessel by an embargo laid by the United States in April, 1812, in anticipation of the war which was declared in June. The timber had been unloaded and floated up a salt-water creek, where at low tide its ends rested on the mud. A libel having been filed against the timber by a District Attorney of the United States, and a Circuit Court, reversing a District Court, having condemned the timber as enemy property forfeited to the United States, the Supreme Court was appealed to for a decision on the question whether the condemnation could properly be made without a legislative act authorizing the confiscation of enemy property in such circumstances.

The decision of the court turned upon considerations of the distribution of powers under the Constitution, rather than upon the existence or non-existence of the right of a sovereign government under international law to confiscate enemy property found within its jurisdiction. Chief Justice Marshall, delivering the opinion of the court over the dissent of Justice Story, with whom concurred one other judge, held "that the power of confiscating enemy property is in the legislature, and that the legislature has (had) not yet declared its will to confiscate property which was within our power at the declaration of war."

In reaching this decision, which was primarily a decision upon constitutional law, the Chief Justice cited the provision of the Constitution that

[19] 8 Cranch, 110.

Congress shall have power to "make rules concerning captures on land and water." Captures, he believed, upon a true construction of this provision, are not necessarily extraterritorial but may be made of enemy property within our own territory. The Act of July 6, 1812, and the Act "concerning alien enemies" (presumably identical with the Act of July 6, 1798, already quoted in this paper) were believed by him to have been passed in the exercise of the power of Congress to regulate the treatment of enemy property as well as enemy persons within the United States. As there had been on the general subject no other Act of Congress except these and three others, which he examined with negative results, he concluded that Congress had not confiscated enemy property in the United States at the beginning of the war. Apart from the express provision of the Constitution, moreover, the Chief Justice was influenced by the reflection that "the question what shall be done with enemy property in our country is a question rather of policy than of law," a question which "is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written . . .; for the consideration of the legislature, not of the executive or judiciary."

In the course of his opinion, the Chief Justice conceded that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found." He then made some remarks which have often been misunderstood, partly no doubt because they have been considered out of relation to their context. These remarks it may be useful to consider attentively in their context. The Chief Justice refers to "the universal practice of forbearing to seize and confiscate debts and credits," and says:

> Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will.

With respect to the remarks above quoted, it should be observed first that, according to the dissenting opinion of Justice Story in the case of Brown *v.* United States, it might well be doubted in 1814 whether the practice of exempting debts from confiscation was quite so uniform as it was supposed.

Secondly, with reference to the statement that reason draws no distinction between debts and other forms of property acquired within the domestic jurisdiction, it should be noted, on the one hand, that history is full of instances in which law and custom have lagged behind logic, and, on the other

hand, that there are in fact substantial reasons for distinguishing debts from other kinds of property. Among these reasons may be mentioned the following: (1) that debts constitute moral obligations which would be felt by many debtors to subsist after the extinguishment of the legal obligations by act of state; (2) that the discovery of debts in time of war presents peculiar difficulties, partly because debts are intangible and partly because debtors would feel justified in concealing their debts, in consequence of their sense of moral obligation to their creditors or of their apprehension of personal actions in the courts of their creditors in the event of their coming later within the jurisdiction of such courts; and (3) that debts between individuals of different nations are, much more obviously than other forms of property, connected with the delicate machinery of international credit.[20]

A third observation which may be made regarding the remarks above quoted from the opinion of Chief Justice Marshall, is that while the Chief Justice made a statement very general in its terms with reference to modern usage, he did not discuss the basis of his statement except as it related to the property of resident enemies. Moreover, he conceded that the usage might not be uniform; and in a later passage of the same opinion he made it clear that under certain circumstances there could be no question of the propriety of the exercise of the right of confiscation, which he believed to exist under the law of nations.

Another part of the opinion of the Chief Justice in the case of Brown *v.* United States which has been misunderstood, is that in which he quotes Vattel as saying that the sovereign cannot detain the persons nor the property of enemy subjects within his dominions at the time of the declaration of war. He then proceeds to state that no reason can be perceived "for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others."

In connection with the quotation of Vattel as an authority on international law, it is appropriate to note the statement of Justice Story in Brown *v.* United States that "a learned civilian, Sir James MacIntosh, informs us that he (Vattel) has fallen into great mistakes in important 'practical discussions of public law.'" It should be borne in mind also that according to Manning's Commentaries on the Law of Nations, Vattel did not profess to write on the law of nations as shown by the practice of nations, but rather upon the law of nature, or what he called the necessary law of nations. This being the case, it should not be surprising if Vattel upon occasion was inclined to see in isolated acts of states evidences of conformity to what he believed to be the proper rule for their conduct.

Apart from the question of the authority of Vattel, moreover, it is appropriate to point out again the danger, to which attention has already been called, of arguing from logic to practice in the realm of law and custom. Al-

[20] *Cf.* Wheaton, Dana's ed., p. 389.

though the learned Chief Justice, in giving incidental consideration to a matter which was not essential to the formation of his opinion, did not perceive a reason for the distinction between the property of resident and non-resident enemies, it cannot be doubted, in view of the express provisions of numerous treaties, that the distinction was in fact made. It may be suggested that one reason for the distinction may possibly have been the belief that persons who are domiciled in a state are so far identified with the interests of that state as to be entitled to a degree of consideration in return for the performance, under normal conditions, of the duties of temporary allegiance. A striking instance of the extent to which domicile has been, for practical purposes, identified with nationality in its consequences, was furnished in 1856 by the case of Martin Koszta, whom the United States undertook to protect through its diplomatic officers in Turkey, although his ties with this country were only those resulting from domicile.

A third passage in Marshall's opinion in the case of Brown *v.* United States which requires examination, is that in which he refers to an argument which he says is based on "the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. . . ." After stating that this position is not allowed, he goes on to say:

> This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

Apart from the misunderstanding regarding Marshall's views as to the relation of usage to international law, to which consideration has already been given, this passage has, it is believed, been seriously misunderstood in that the "obloquy," which the Chief Justice mentioned as the penalty of the disregard of rules of modern usage, has been thought to be held up by him as the penalty for the disregard of the specific usage or alleged usage with respect to the treatment of enemy private property in the domestic jurisdiction. In view of Marshall's recognition of the lack of uniformity in the practice of nations with reference to enemy private property within their jurisdiction, to which attention has already been called, it is at least doubtful whether his reference to this usage is not applicable to modern usage in general rather than to the specific usage or alleged usage in question. If he was in fact referring to this specific usage or alleged usage, it would appear from what follows his use of the term "obloquy" that he did not conceive it to be necessary or proper for a nation invariably so to act as to escape "obloquy." The rule, he says, is "flexible," "subject to infinite modification," and "depends on political considerations which may continually vary." The question of the treatment of enemy property is "a question rather of policy than of law." In all these expressions there is no hint of

condemnation of the sovereign who, upon full consideration, determines to act contrary to the practice which has been usual among nations. It is believed that the word "obloquy" has been a bogey to modern commentators in a manner which would have astonished the great Chief Justice.

In 1825 began the series of treaties concluded by the United States with the new nations south of this country. In that year a treaty was concluded with Central America. This treaty contained the following provisions:

ARTICLE XXV

If, by any fatality which cannot be expected, and which God forbid, the two contracting parties should be engaged in a war with each other, they have agreed, and do agree, now for then, that there shall be allowed the term of six months to the merchants residing on the coasts and in the ports of each other, and the term of one year to those who dwell in the interior, to arrange their business and transport their effects wherever they please, giving to them the safe conduct necessary for it, which may serve as a sufficient protection until they arrive at the designated port. The citizens of all other occupations who may be established in the territories or dominions of the United States and of the Federation of the Centre of America, shall be respected and maintained in the full enjoyment of their personal liberty and property, unless their particular conduct shall cause them to forfeit this protection, which, in consideration of humanity, the contracting parties engage to give them.

ARTICLE XXVI

Neither the debts due from individuals of the one nation to the individuals of the other, nor shares, nor moneys which they may have in public funds, nor in public or private banks, shall ever, in any event of war, or of national difference, be sequestered or confiscated.

It should be noted that the provision here made for continued residence is not, like that in the British treaty of 1794, applicable to merchants as well as to persons in other occupations.

Substantially identical provisions were incorporated in treaties concluded with Brazil in 1828, Mexico in 1831, Chile in 1832, Venezuela in 1836, Ecuador in 1839, and Colombia in 1846. None of these treaties professed to be permanent except the treaty with Mexico, and it was in the war with that country in 1846–47 that the treaty engagements of the United States with respect to enemy private property have had their only practical application in relations between the United States and the Latin-American countries.

During the war with Mexico, the United States, although not bound by its treaty to refrain from the seizure of the property of non-resident Mexicans, appears to have refrained in fact from the seizure of such property. Information is not at hand as to the extent of such property which may have existed in the United States at the time of the war with Mexico. The absence of legislation authorizing the seizure of Mexican property was construed by a District Court of the United States, in the case of *The*

Juanita,[21] to be conclusive against the attempt to seize a vessel and its cargo found in a port of the United States at the outbreak of the war. As the decision of the District Court was not appealed, it is not possible to speak with confidence on the question whether the highest court of the United States would have approved this extension of the doctrine announced by Chief Justice Marshall in the case of Brown *v.* United States. The treaty of peace with Mexico confirmed the provisions of the treaty of 1831 with reference to the treatment of enemy persons and property.

In 1849 a treaty of the same character as those previously mentioned as concluded with Latin-American countries, was signed with Guatemala. In the following year, 1850, a similar treaty was signed with Salvador. In 1851 a treaty was signed with Costa Rica, containing a provision substantially identical with that contained in Article XXVI of the British treaty of 1794. It is especially remarkable in that it was apparently intended to be of permanent duration. The treaty with Bolivia, signed in 1858, returns to the less liberal model of the treaty of 1825 with Central America. The treaty with Paraguay, on the other hand, signed in the following year, 1859, is even more liberal than the treaty with Costa Rica in that it allowed not a specified period, but such period as might be required for the withdrawal of the effects of such enemies as preferred to withdraw.

On a general survey of the treaties concluded by the United States with Latin-American countries between 1825 and 1859, it appears to have been the policy of the United States during the first part of this period to enter into treaties allowing a period for the withdrawal of merchants, other persons being permitted to remain; and in the latter part of the period allowing the continued residence of all enemies, subject to the observance of the laws. During the whole of this period it was the policy of the United States to enter into treaties providing for the exemption from seizure of debts and shares or moneys in the public funds or in banks. It should be noted that of the treaties concluded with various Latin-American countries during this period, there are now extant only the treaties with Brazil, Bolivia, Colombia, Costa Rica and Paraguay.

The question of the confiscation of enemy private property was presented to the American Government as a practical question in the war of 1861 to 1865. Early in the course of this war, which was the first since the Revolution to engage the passions and the resources of the country to the highest degree, an Act was passed by Congress (August 6, 1861) providing for the confiscation of property used or intended to be used in the promotion of the cause of the Confederacy. This Act has been stated by various American writers on international law to be without direct bearing on the question of the right to confiscate enemy private property *jure belli*. It may be noted, however, that the members of Congress debating the Act before its passage were of the opinion that the United States, as the result of the existence of a

[21] 28 Federal Cases, No. 17039.

state of war with the Confederacy, had the right to confiscate enemy property in the loyal States. Thus Representative Thaddeus Stevens, on August 2, 1861, said:[22]

> When a country is at open war with an enemy, every publicist agrees that you have the right to use every means which will weaken him. Every measure which will enable you sooner to subdue him and triumph over him, is justifiable on your part. If by taking from him every dollar of property which he has on earth will weaken his hands, will strengthen your hands, you are at liberty to fight him in that way instead of putting him to death.

It may also be noted that a similar view was taken both of this Act and of the subsequent Act of July 17, 1862, in cases later coming before the Supreme Court of the United States.

The Act of July 17, 1862, was passed after more than four months of debate, in the course of which Senator Sumner of Massachusetts, Senator Trumbull of Illinois, Senator Howard of Michigan, and Representative Sargent of California strongly urged the right of the United States under the law of nations to seize enemy private property within its undisputed jurisdiction. Senator Saulsbury of Delaware and Representative Thomas of Massachusetts denied the existence of this right. Senator Sumner, in the course of his elaborate discussion of the bill, made the following remarks:[23]

> Clearly the United States may exercise all the rights of war, which, according to international law, belong to independent States. . . . Harsh and repulsive as these rights unquestionably are, they are derived from the overruling, instinctive law of self-defense, which is common to nations as to individuals. Every community having the form and character of sovereignty has a right to national life, and, in defense of such life, it may put forth all its energies. Any other principle would leave it the wretched prey of wicked men, abroad or at home. In vain you accord to it the rights of sovereignty if you despoil it of other rights without which sovereignty is only a name. . . .
>
> I rejoice to believe that civilization has already done much to mitigate the rights of war, and it is among long-cherished visions, which even present events cannot make me renounce, that the time will yet come when all these rights will be further softened to the mood of permanent peace. But though in the lapse of generations changed in many things, especially as regards non-combatants and private property on land, these rights still exist under the sanction of the laws of nations, to be claimed whenever war prevails. It would be absurd to accord the right to do a thing without at the same time according the means necessary to the end. And since war, which is nothing less than organized force, is permitted, all the means to its effective prosecution must be permitted also, tempered always by that humanity which strengthens while it charms.

The Act of August 6, 1861, as has already been noted, and the Act of July 17, 1862, eventually came before the Supreme Court of the United States for

[22] 31 Congressional Globe, 414.

[23] 32 Congressional Globe, 2191.

consideration as to their constitutionality. This question was decided by the court directly upon the issue of the existence of a rule of international law allowing the confiscation by the sovereign of the enemy private property found within his jurisdiction at the outbreak of war. Justice Strong, delivering the opinion of the court in the case of Miller *v.* United States,[24] made the following statements:

> The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The constitution confers upon Congress, expressly, power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is, and always has been, an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right, it would be set at rest by the express grant of power to make rules respecting captures on land or water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations; and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. . . . The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

The passage of the confiscation acts in August, 1861, and July, 1862, was followed in January, 1863, by the issuance of the proclamation emancipating the slaves. This was also a measure of confiscation, and although it was intended to operate chiefly in the enemy's country, the words of President Lincoln in justification of his action are significant, from the point of view which particularly interests us. The President said, in a letter to James C. Conkling, on August 26, 1863:[25]

> I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said, if so much, is, that

[24] 11 Wall. 268, 20 L. Ed. 135.

[25] William E. Barton, The Life of Abraham Lincoln, Vol. 2, p. 245.

> slaves are property. Is there, has there ever been, any question that by the law of war, property both of enemies and friends may be taken when needed? And is it not needed wherever it helps us and hurts the enemy?

Inasmuch as the Confederate States, though separated from the Union for the duration of the war, were in fact conducting their operations in accordance with what they conceived to be the law of nations, and inasmuch as their conception of the law of nations was derived from the same sources and based on the same national experience as that of the Northern States, it is appropriate to note that on August 30, 1861, the Congress of the Confederacy, by way of retaliation, passed a law providing for the sequestration of the property of alien enemies within the territory of the Confederacy.[26]

In 1864 the system of treaties between the United States and Latin-American countries, containing provisions with reference to the treatment of enemy private property, was extended by the conclusion of treaties with Haiti and Honduras. The treaty with Haiti includes the usual provision against the sequestration or confiscation of money, debts and shares in the public funds or in banks, and provides, in addition, that no other property of either party shall be sequestrated or confiscated in the event of war or national difference. This treaty contemplates the withdrawal of the merchants and other citizens and inhabitants on each side, with their effects and movables, within six months from the declaration of war. The treaty was made terminable after eight years and was in fact terminated in 1905.

The treaty with Honduras does not contain the same provision as the treaty with Haiti with reference to the exemption of all property of the nationals of each country, irrespective of their residence. It provides that a period of six months shall be allowed to the nationals of each country residing upon the coast of the other, and twelve months to those residing in the interior, "to wind up their accounts and dispose of their property." Citizens of either country, established in the other in the exercise of any trade or special employment, are to have the privilege of remaining and continuing such trade and employment without interruption, so long as they behave peaceably and commit no offence against the law, and the goods and effects of persons so established are granted exemption from seizure or sequestration. The article which contains these provisions, Article XI, is one of the articles intended to be of permanent duration, and it appears to be still in effect.

In 1867 treaties were concluded with Nicaragua and the Dominican Republic, the first containing substantially the same provisions as those above cited from the treaty with Honduras and the other following the model of the treaty with Haiti. The Dominican treaty was terminated in 1898, and the Nicaraguan in 1902.

[26] McPherson, Political History of the United States during the Great Rebellion (4th ed.), p. 198.

In 1870 the treaty which had been concluded with Salvador in 1850 was superseded by a new treaty which contained, in Article 27, a provision substantially identical with that which has been cited from the treaty of 1864 with Honduras. In this year also a new treaty was concluded with Peru containing substantially the same provisions as those above cited from the treaty of 1864 with Haiti. The treaty with Salvador was terminated in 1893 and that with Peru, having expired in 1886, was replaced in 1887 by a treaty containing substantially the same provisions, which in turn expired in 1899.

The treaty of 1887 with Peru is the latest of the series of treaties concluded with Latin-American countries with reference to the treatment of enemy property. By way of summary of the present situation as regards these treaties, it may be stated that, of the six treaties dealing with this matter at present in force between the United States and Latin-American countries, three (those with Brazil, Colombia and Bolivia) contain provisions allowing a specified period for the withdrawal of merchants and their effects, permitting enemy residents other than merchants to remain upon condition of compliance with the laws, and forbidding the confiscation of debts and shares of moneys in the public funds or in banks. The other three treaties (those with Costa Rica, Paraguay and Honduras) contain somewhat more liberal provisions with reference to the property of enemy residents and their right to remain in the country, but they do not contain the express provisions incorporated in the former treaties with Haiti, Peru and the Dominican Republic against the confiscation of property, of whatever description, irrespective of the residence of the owners. Whether the United States would now be disposed to incorporate such provisions as those in new treaties with the Latin-American countries, or with other countries cannot be ascertained from the information available. It may, however, be regarded as significant that the recent treaty with Germany, which conforms to the model adopted by the United States for a new series of treaties with various countries, contains no provision with respect to the treatment of enemy property.

On the outbreak of war with Spain in 1897 the United States considered itself bound by the provision in Article XIII of the treaty of 1795, that the merchants of either country residing in the territory of the other should be allowed a period of one year after the proclamation of war "for collecting and transporting their goods and merchandizes." Although Spain, in correspondence, indicated that she did not consider herself bound by this provision, it appears that the property of American merchants or other American citizens in Spain was not in fact confiscated. Neither does the property of Spanish merchants and other persons of Spanish nationality appear to have been confiscated in the United States. It may be relevant to note, however, that neither belligerent refrained from the exercise of the right to seize private property at sea, and that in certain cases the forces of

the United States invading Spanish territory, appropriated the private property of Spanish subjects without payment of compensation. One of these cases having come before the United States Supreme Court for consideration, the court held the action of the American forces to have been within the rights of war, and Mr. Justice McKenna, delivering the opinion of the court, made the following statement, which may be taken as having a broader application than was strictly necessary for the purposes of the decision:[27]

> We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property and subject to seizure, confiscation and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government and of the citizens or subjects of the other.
>
> [After noticing the language of the Supreme Court in *The Grapeshot*, 9 Wall. 129, a case arising in Louisiana after parts of that state had resubmitted to the United States] . . . But it was not intended to express a limitation upon the undoubted belligerent right to use and confiscate all property of an enemy and to dispose of it at will. Miller *v.* United States (Page *v.* U. S.), 11 Wall. 268, 305. L. Ed. 135, 144.

On the basis of the foregoing review, it is possible to make the following generalizations:

The Supreme Court has uniformly held that the United States has the right, under the law of nations, to confiscate enemy property of any and all kinds found within the country at the outbreak of war. The existence of restrictions of a moral and political nature upon the exercise of the right has been recognized, but the right itself has been held to be undiminished. The existence of various usages with respect to the different kinds of property has occasionally been mentioned, but none of these usages have been recognized by the court as having reached the stage at which they are obligatory as part of the customary law of nations. It is only fair to state that no cases directly involving the confiscation of debts appear to have been presented to the courts since 1796.

The policy of the United States, as reflected chiefly in legislation and in treaties, has been very consistent in regard to debts and shares of moneys in the public funds or in banks, irrespective of the residence of the owner. Although debts were generally sequestered during the Revolutionary War and actually confiscated in one of the States, the practice of confiscation was declared in a permanent treaty between the United States and Great Britain in 1794 to be unjust and impolitic, and although this declaration was not

[27] Herrera *v.* United States, 222 U. S. 558 (1911).

repeated in subsequent treaties, the provision against confiscation of debts has been embodied in the treaties of the United States with such regularity that, with due reservation in regard to the possibility that the usage may not have fully developed into a rule of customary law binding upon all nations, it may safely be said that it has been the consistent policy as well as practice of the United States to refrain from the confiscation of debts and shares or moneys in the public funds or in banks.

In regard to property of other kinds belonging to enemies resident in this country, the practice of the United States has been somewhat less consistent. It was indeed provided in an Act of 1798 that enemies resident within the United States should in general be allowed, for the recovery, disposal and removal of their goods and effects and for their departure, the full time stipulated by any treaty between the United States and the hostile nation, and that in the absence of such treaty, the President of the United States might ascertain and declare such reasonable time as might be consistent with the public safety and according to the dictates of humanity and national hospitality. The United States has, moreover, concluded a system of treaties stipulating periods for the withdrawal of resident enemies, with their property, or in some cases providing that such enemies may remain in the country, undisturbed in their possessions, upon condition of compliance with the laws. On the other hand, it is clear that these treaties, most of which are no longer in force, were binding only between the United States and the other parties to them, chiefly Latin-American countries, and could not be said to be conclusive evidence of anything more than a willingness on the part of the United States to bind itself by treaty to a certain course of action in its relations with certain other countries. Such being the case, although this country did not in fact seize the property of enemy residents in the wars of 1812, 1846 and 1897 with Great Britain, Mexico and Spain, respectively, it would seem to be of considerable significance that when the United States, from 1861 to 1865, found itself engaged in a war with an enemy who was unprotected by treaty provisions of the character indicated, it resorted to the exercise of what was believed, by the President, by the leaders of Congress and by the Supreme Court, to be a still existing right under the law of nations to confiscate enemy private property, irrespective of the location of the property or the residence of the owner. It should be noted, however, that from the nature of the war in progress, most of the property affected by the legislation of the United States during the Civil War was necessarily that of persons resident outside the loyal States.

As regards the property, other than debts and the like, belonging to non-resident enemies, it appears from our review that, except during the Revolutionary War and the Civil War, the course of the United States has not been such as to warrant confident generalizations as to its significance. Three treaties were concluded with Latin-American countries in which the United States engaged itself, irrespective of the question of residence, to refrain

from the confiscation of enemy private property of every description. These treaties, however, were not permanent and they have long since been terminated. They cannot, therefore, it is believed, be regarded as evidence of an established policy of the United States. The fact that neither the general legislation of 1798 nor the system of treaties concluded before the Civil War makes express provision for the protection of property of non-resident enemies may possibly have been due to the fact that absentee ownership was not sufficiently common to make it seem necessary to provide specifically for the protection of property of absentee owners. It seems more likely, however, that the omission of stipulations as to the protection of such owners was due mainly to the consideration that these persons were not, like the resident owners, so far identified with the country as to be entitled either to the privilege of withdrawing their property in a reasonable time or to that of leaving their property in the country, under the protection of the laws. On the whole, in view of the absence of express provisions in general legislation or treaties respecting the property of absentee owners, and especially in view of the action of the United States during the Revolutionary War and the Civil War, when there was in fact considerable property of non-resident owners inviting seizure and use for the purposes of the war, it is believed that it cannot be said that there was in the United States, prior to 1914, any established usage of exempting the property of non-resident enemies from confiscation.

In all that is said regarding the policy and practice of the United States prior to 1914, moreover, it should be borne in mind that the United States was not obliged to adhere to its previous policy or follow its previous practice, except in so far as that policy and that practice were a part of and consistent with an international usage so generally accepted and approved as to constitute a customary rule of the law of nations.

THE INTERNATIONAL JOINT COMMISSION BETWEEN THE UNITED STATES AND CANADA [1]

By Robert A. MacKay

Professor of Government and Political Science, Dalhousie University, Halifax, N. S.

The preamble of the Boundary Waters Treaty of 1909 between Great Britain (on behalf of Canada) and the United States declares its purpose to be:

> To prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise.[2]

For this purpose it defines in general the obligations of each in relation to the other as respects the use of boundary and certain other waters. For the application of these rules, and for certain other purposes, it provides for a permanent international joint commission of six members, three to be appointed by each country.[3] The operation of this commission is the subject of this study.[4]

[1] In the preparation of this manuscript I have been ably assisted by Mr. Arnold J. Zurcher, formerly President White Fellow in Political Science at Cornell University, now Charlotte Elizabeth Proctor Fellow in Politics at Princeton University.

[2] Text in Treaties and Agreements affecting Canada in force between His Majesty and the United States of America, 1814–1925, Ottawa, 1926, p. 312; Great Britain, Treaty Series, No. 23, 1910; U. S. Treaty Series, No. 548; Supplement to this Journal, Vol. 4, p. 239.

[3] The idea of a joint commission appears to have arisen from two sources: (1) International problems arising out of the diversion or obstruction of the Great Lakes. A joint commission with powers of investigation only was appointed in 1905 to study and report on several problems. In several instances it recommended a permanent joint commission with administrative powers to control the uses of boundary waters. In one report the Canadian section outlined in detail the principles which should govern such uses, and recommended a treaty establishing these principles and a commission to enforce them. This recommendation appears to have been followed very closely in framing the treaty of 1909. See full report of International Waterways Commission; Sessional Papers, Canada, Vol. 47 (1913), 19a, No. 12, especially at p. 340. (2) A dispute of long standing as to the distribution of the St. Mary and Milk Rivers and their tributaries for irrigation. An agreement between officers of both governments recommended joint control of distribution. *v.* H. of C. (Canada) Debates, 1910–11, pp. 9101–13; U. S. Reclamation Service Annual Reports, 1903–4, pp. 79–82; 1910, p. 160.

[4] A brief analysis of the treaty of 1909 and synopsis of the cases before the Commission is contained in a pamphlet issued by the secretary of the American section entitled The International Joint Commission: Organization, Jursidiction and Operation under the Treaty of

Functions and Powers

In the first place, under Article VIII of the treaty the Commission is empowered to pass upon applications for the use or obstruction or diversion of certain waters along the international boundary. In permitting such applications it is guided by the standard for the distribution and use of waters provided by the treaty; it must in certain cases, and may in others, require means for the protection and indemnity of interests prejudiced by the proposed use or diversion or obstruction; and in granting permits it follows a procedure which is essentially judicial. Its function, therefore, under this article is a double one—administrative, in the application by a system of permits, of a legislative rule to particular cases as they arise; judicial, in its procedure and in the adjustment of conflicting interests on the basis of equity. For convenience we may, therefore, style this function "administrative justice," and its powers, quasi-judicial. Secondly, under Article VI it is an executive body responsible for carrying out in detail through subordinate officers rules agreed upon by the high contracting parties for the distribution of certain waters for irrigation. Thirdly, under Article IX it becomes a commission of enquiry or investigation and report. Fourthly, under Article X it may act as a court of arbitration. We shall treat each function separately.

I. Quasi-Judicial Power. (1) Original Jurisdiction

The Commission's quasi-judicial power is derived primarily from Article VIII which empowers it to pass upon applications for certain uses of three classes of waters, namely, boundary waters, waters flowing from boundary waters, and waters flowing across the boundary.

First, as to boundary waters, for purposes of the treaty the term is defined as:

> The waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary. (Preliminary Article.)

In brief, the term "boundary waters"[5] includes only "fresh" waters along the course of which or through which the international line runs.

January 11, 1909, between the United States and Great Britain. Washington, Government Printing Office, 1924. *Cf.* also this Journal, Vol. VI, 187; Round Table, Vol. V, 1915, 855; Burpee, Dalhousie Review, Vol. III, 163; Burpee, University Magazine, Oct. 1915; Tawney, Minn. State Bar Association, Aug. 8, 1917.

[5] "Boundary waters include the international portions of the St. Croix and St. John Rivers between the State of Maine and the Province of New Brunswick; the St. Lawrence River from Cornwall to Kingston; Lake Ontario, Niagara River, Lake Erie, Detroit River,

With reference to the above waters, it is agreed that no "uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except . . . with the approval . . . of the International Joint Commission." (Art. III.) From this broad grant of jurisdiction there are certain exceptions: (a) diversion from the Niagara River provided for by special agreement in the treaty itself (Art. V); (b) any other "uses, obstructions, and diversions heretofore permitted" (Art. III), or (c) "hereafter provided for by special agreement between the parties" (Art. III);[6] (d) "the existing rights" of both parties to construct works on their own side of the line for the improvement of navigation, provided such works "do not materially affect the level or flow of the boundary waters" on the other side of the line (Art. III); and (e) "the ordinary use of such waters for domestic and sanitary purposes" (Art. III).

Secondly, as to waters flowing from boundary waters, both parties agree that no obstruction, the effect of which is to raise the water level on the other side of the boundary, shall be erected therein without the approval of the Commission. (Art. IV.)

Thirdly, a similar agreement is entered into with respect to obstructions below the international boundary in streams which cross the boundary line. (Art. IV.)

In addition to the subject matter covered by the above provisions of the treaty of 1909, the jurisdiction of the Commission was extended by the Lake of the Woods Treaty of 1925 which provides: "No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except . . . with the approval of the International Joint Commission."[7] With this exception, the Commission has no jurisdiction over "uses" or "diversions" in waters flowing into boundary waters, or, if they occur above the boundary, in trans-boundary streams. Both classes of cases are, indeed, expressly reserved by the treaty of 1909 to "the exclusive jurisdiction and

---

Lake St. Clair, St. Clair River, Lake Huron, St. Mary's River, Lake Superior, the series of small rivers and lakes from Lake Superior over the height of land to Rainy Lake, Rainy Lake, Rainy River, and the Lake of the Woods, to that minute but very controversial point in diplomatic history, the northwest point of the Northwest Angle Inlet of the Lake of the Woods." L. J. Burpee, "International Joint Commission," University Magazine, Oct. 1915.

[6] "Special agreements" includes "not only direct agreements between the High Contracting Parties, but also any mutual arrangement . . . expressed by concurrent or reciprocal legislation." (Art. XIII.)

A privately owned dam on an international stream authorized by statute in both countries, though these statutes were passed independently and without any previous understanding or arrangement between the high contracting parties, is a work authorized by "special agreement" and is therefore outside the Commission's jurisdiction. Rainy River Improvement Co., April 18, 1913.

[7] Art. XI of the Treaty and Protocol to Regulate the Levels of the Lake of the Woods, signed Feb. 24, 1925, this JOURNAL, Vol. 19, Supplement, pp. 122–33.

control" of the high contracting parties within their respective territories.[8]

The case of "uses or diversions" from waters flowing from boundary waters is more obscure. As has been noted above, jurisdiction over obstructions in waters flowing from boundary waters, the tendency of which is to raise the level on the other side of the boundary, is expressly delegated to the Commission. While jurisdiction over "uses or diversions" of such waters which would lower levels on the other side of the boundary is not expressly included, neither is it expressly excluded along with other prohibitions.

The Commission was faced with the problem of settling this question of jurisdiction in the application of the City of Winnipeg to divert water from Shoal Lake, through which the Lake of the Woods, a boundary water, empties.[9] Canada, on whose side of the boundary the entire development would occur, argued that the Commission should take jurisdiction because of the close geographical relations between the two lakes. It was pointed out that on occasion during low water the diversion contemplated might materially increase the discharge from the Lake of the Woods into Shoal Lake. In short, it was argued, so close was the physical relationship between the two bodies of water, that any material alteration of the levels in Shoal Lake might, in fact, alter the levels of the Lake of the Woods, a boundary water, and might thus affect injuriously navigation and riparian interests, the protection of which was the primary object of the treaty.[10] On the advice of the Commission the application was re-worded so as to purport to be a request for a diversion from Shoal Lake and the Lake of the Woods.[11] On this fiction it assumed jurisdiction. This case would seem to imply that the Commission will take jurisdiction over uses and diversions from waters flowing from boundary waters if such uses or diversions are in effect diversions from boundary waters.

PRINCIPLES APPLICABLE TO THE USES OF INTERNATIONAL WATERS

As regards the right of a riparian state to use, obstruct, or divert boundary waters, international law is obscure, though in the matter of navigable boundary waters, it is fairly clear that riparian states have a common right

[8] Art. II. The following interesting provision is, however, added: "But it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto."

[9] Application Greater Winnipeg Water District, Sept. 8, 1913, Conditional Approval, Jan. 14, 1914.

[10] Hearings and Arguments, Greater Winnipeg Water District, Sept. 8, 1913, pp. 24–8, 32, 36, 58, 61–2, 64–5, 92–5.

[11] *Ibid.*, 92–5.

of navigation. The right of navigation on boundary waters had been confirmed in various treaties between the United States and Great Britain, but nothing had been said as to other uses.[12] As to the right of other uses which would exist apart from treaty, custom would seem to warrant any use which did not interfere with the right of navigation enjoyed by other riparian owners.[13]

Waters flowing into boundary waters, or across international waters, are, however, generally conceded to be entirely within the jurisdiction of the state through which they flow, and this would seem to be the case with waters flowing from boundary waters, unless part of an international waterway.[14] In brief, international law does not clearly recognize the rights either of a lower or of an upper riparian owner which are recognized by municipal law.

These deficiencies were largely remedied by the treaty, in so far as the United States and Canada are concerned.[15] In the first place, it is declared that both parties have on their own side of the boundary "equal and similar rights" in the use of boundary waters (Art. VIII). This provision, however, does not prevent temporary diversions of boundary waters by one side when local conditions prevent an equal or advantageous use by the other, and "where the diversion does not diminish elsewhere the amount available for use on the other side." (Art. VIII.)[16]

Secondly, an order of precedence is prescribed for the use of boundary waters, and no use is to be permitted if it conflicts with or restrains any other use which is given preference. This order is:

(1) Uses for domestic and sanitary purposes;
(2) Uses for navigation, including the service of canals for the purpose of navigation;
(3) Uses for power and for irrigation purposes. (Art. VIII.)

Thirdly, the Commission is empowered to prescribe, as a condition to a permit for the exploitation of waters, the "construction of remedial or protective works to compensate so far as possible for the particular use or diversion

[12] Treaties of 1794, Art. II; 1817; 1842, Arts. II, III, VII; 1854, Art. IV; 1871, Arts. XXVI–XXVIII.

[13] Cobbett, Cases and Opinions on International Law, I, 123.

[14] Fenwick, International Law, 267. Faber Case, Ralston's Reports of Venezuelan Arbitrations (1903), 600, 630. *Cf.* also I. J. C. Hearings, New Brunswick Electric Power Commission Application, 122 ff. For a contrary opinion *see* Oppenheim, 3rd ed., I, 321.

[15] These rules follow recommendations of the Report of the Canadian Section of International Waterways Commission, 1906, Can. Scss. Pap., Vol. 47 (1913), 19a, No. 12, p. 340.

[16] The rule for suspending equal distribution at points where such distribution was impossible or disadvantageous had been interpreted by the Commission to mean that it could authorize one side to divert more than a moiety of the waters, this privilege to continue so long as there was "occasion *bona fide* to use the same, and when such use ceases the question of diversion should again be considered by the Commission, in view of the local conditions then existing." Order and Opinion, St. Croix Water Power Co., p. 11.

proposed," and further, to "require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of interests on either side of the boundary." As regards uses and diversions, this authority of the Commission is discretionary. As regards cases where the water level is likely to be raised on the other side of the boundary as a result of proposed obstructions in boundary waters, or in waters flowing from boundary waters, or in waters below the boundary in trans-boundary streams, "the Commission *shall require*, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby." (Art. VIII.) Here the duty is not discretionary, but mandatory.

The interests to be protected may be either public or private. Thus the Commission has required protective works for the protection of navigation [17] and rights of fishery,[18] as well as for the protection of private riparian owners.[19]

It will be observed further that the power to prescribe conditions, whether for uses and diversions or for obstructions, includes the power to provide for "the protection and indemnity" for injuries arising therefrom. The inclusion of the word "indemnity" in both instances is surely not without meaning. An important question arises as to the discretion of the Commission in determining what constitutes an indemnity. In many cases the construction of remedial works would constitute in itself an indemnity, but in others it might not, as, for example, where it might be impossible to prevent land from being flooded by the construction of a dam, or where the riparian owner might be prevented from access to his land by water. In such instances monetary damages might be the only "suitable and adequate" indemnity. Could the Commission in such cases fix the damages? No occasion for such action would arise, of course, where the use or diversion contemplated would injure interests on the same side of the line, since the courts would be open to the injured parties. This in itself would seem to constitute "suitable and adequate provision" for their indemnity. Where the injury occurred across the line the courts would not be available.[20] It

[17] The Watrous Island Boom Company, Order and Opinion, pp. 73–89; Michigan Northern Power, Co., Order and Opinion, p. 5.

[18] Application of the State of Maine for St. Croix River Fishways, Hearings and Order, p. 136; St. Croix Water Power Co. and Sprague's Falls Manufacturing Co., Ltd., Order and Opinion, p. 4.

[19] New Brunswick Electric Power Commission, Hearings and Order, pp. 2–3; Michigan Northern Power Co., Order and Opinion, pp. 5–13; 18–23.

[20] It should be observed that this statement does not apply to injuries arising on one side of the line from uses or diversions on the other side of waters which in their natural channel would flow into boundary waters or across the boundary. By Article II such waters are excluded from the Commission's jurisdiction. In such cases there would clearly be the same right of suit for the injured party as if the injury occurred on the same side as the use or diversion in question. See footnote 8 above.

would seem to follow, therefore, that in such an instance, if the Commission considered monetary damages necessary, it would require them and might conceivably fix the damages itself.

These observations are borne out in part by the opinion in the New Brunswick Electric Power Commission application (June 22, 1925). The application proposed to dam the St. John River about three miles below the Maine-New Brunswick boundary. The result of the damming of the river would be to keep the river continually at a level close to the maximum high water mark under natural conditions. This would flood approximately 800 acres, which would normally lie uncovered at low water, part of which lay in the Province of New Brunswick and part in the State of Maine. In addition to other riparian owners, one Canadian and three American companies were likely to be adversely affected. The Power Commission had, however, reached agreements beforehand with these corporations as to the method of assessing damages and the payment thereof. These agreements accompanied the application.[21]

The agreement with the St. John Lumber Company of Maine is typical of all three agreements with the American corporations.[22] The Power Commission agreed to pay to this company "all damages" resulting from the raising of the river. In case the two parties were unable to agree as to the amount of the damages, an arbitral board, consisting of an engineer appointed by each party, was to be constituted. In case this board could not agree, it was itself to appoint a third member. In case it could not agree on the third member, he should be appointed by the two chairmen of the International Joint Commission. Further, in case the damages fixed by this board were not paid within thirty days, the lumber company was given the alternative, either of applying to the International Joint Commission, which should then suspend the operation of the order of approval, or of maintaining an action against the Power Commission in the courts of New Brunswick.[23] Similar provisions are made in case the Power Commission is guilty of negligence in permitting the water level to be raised above the mean level agreed upon. This agreement between the lumber company and the Power Commission, as well as those with the other corporations, are included as an essential part of the order of approval. Thus the Commission, while it did not itself fix the damages or the means of assessment, is potentially an essential part of the machinery for assessing those damages and for compelling payment thereof.

The authority of the Commission to prescribe "suitable and adequate" provisions for the protection and indemnity of interests likely to be injured

[21] See Order of Approval, Application, Hearings, pp. 7–11.

[22] Schedule A, *ibid*, 174–6.

[23] The right of action against the Power Commission is an important concession, since the Commission is a subsidiary of the Government of New Brunswick and hence immune from suit unless by consent. See *ibid.*, 28 ff.

by the use of water has had several important consequences. In the first place, it is not always possible to determine in advance what is suitable or adequate indemnity or what constitutes sufficient remedial and protective works, because every contingency cannot always be foreseen. If the conditions attached by the Commission for the protection of interests do not, in fact, prove suitable and adequate, is the Commission barred from taking subsequent action? In an early case, it came to the conclusion that it was not. Said Commissioner Casgrain in the opinion on the Algoma Steel Corporation's application:

> There is nothing in the treaty which says that once we have approved of remedial or protective works, the commission, in respect of these works, is *functus officio*. The matter having been submitted to us, having been studied with all the care and attention which it requires, and the particular means provided by the treaty to ascertain the true state of facts and the exact condition of things having been taken, it is for the commission to say whether it approves, once for all, what provision shall be taken for the protection of the interests involved, or whether this provision, from the nature of things, having proved unsuitable and inadequate, the parties may not be at liberty to return before the commission, point out the inadequacy or insufficiency of the means employed, and obtain a further order, if necessary.[24]

The right to retain jurisdiction in the Michigan Northern Power Company case, decided about the same time, was based squarely on the power to prescribe suitable and adequate conditions. The opinion, delivered by Commissioner Tawney, declared:

> If in the judgment of the commission it is necessary to suitably and adequately protect the interests on the other side of the line, it retains jurisdiction over these works to the end that such jurisdiction may at any time hereafter be invoked for that purpose, it is the duty, as well as the responsibility, of the commission, to do so, and for this purpose full power is conferred by the treaty.[25]

This opinion, however, found still wider ground. The object of the treaty as declared by the preamble was to settle disputes outstanding and to make provision for settlement of disputes which should thereafter arise. If the Commission did not retain jurisdiction, and the protective works proved inadequate, interests on either side might suffer irreparable injury. This would tend to multiply disputes—a result which would defeat rather than fulfil the professed object of the treaty.

On the above grounds the Commission, therefore, added as a condition of the order of approval, that either government, or any private person or corporation through his or its government, might apply to the Commission for

[24] Order and Opinion, p. 23. [25] Opinion and Order, p. 23.

an alteration of the order, and such changes as the Commission should make should be binding upon the parties.[26]

This right to retain jurisdiction and to alter the conditions of the original order of approval has been exercised and enlarged in six later cases.[27] The terms in three of these cases would allow the Commission to act directly on its own initiative.[28] In four of them it has even gone so far as to attach as a condition its right in certain contingencies to annul the order entirely.[29]

Quasi-Judicial Powers. (2) Appellate Jurisdiction

The provision for suitable and adequate protection of interests endangered has had even more important consequences. It is of importance that the orders of the Commission to secure suitable and adequate protection shall be duly carried out. The Commission itself has no power of police; it has been driven then to seek other institutional means. The first step was to leave the duty to both governments. In the Watrous Island Boom Company order of 1913, it was provided that the conditions as to the construction of the works in question, attached to the order of the Commission, should be carried out under the supervision of the War Department of the United States and of the Department of Public Works of the Dominion of Canada.[30]

The second step occurred in the St. Mary's River Diversion cases[31] the following year. Here two separate corporations, one on either side of the boundary, requested permission to obstruct and divert water from the St. Mary's River for purposes of power. The proposed works would regulate artificially the discharge from Lake Superior and hence the levels of the lake. The Commission and the parties interested were satisfied that the works proposed for regulating the flow would, if properly handled, prevent any damage to riparian interests or to navigation. If, however, these were not carefully operated and properly maintained, they might cause "irreparable injury to public and private interests."[32] Private interests likely to be affected were, therefore, averse to leaving control of these regulatory works entirely in the hands of the corporations themselves, and requested international control. The United States, however, objected to international control and offered to assume responsibility itself for overseeing the operation of works on its own side of the river. Canada, on the other hand, asked for

[26] Order, Michigan Northern Power Co., para. 12; Order, Algoma Steel Corporation, Ltd., para. 12.

[27] Orders: St. Croix Water Power Co. and Sprague's Falls Mfg. Co., Ltd., para. 2; St. Lawrence River Power Co., 1918, para. 3; St. Lawrence River Power Co., 1922, para. 3; New Brunswick Electric Power Commission, paras. 1, 2; International Lumber Co., para. B.

[28] St. Lawrence River Power Co., 1918 and 1922; International Lumber Co.

[29] *Ibid.*, and New Brunswick Electric Power Commission.

[30] Order, Watrous Island Boom Company, para. 3.

[31] Michigan Northern Power Co., and Algoma Steel Corporation, Ltd.

[32] Order and Opinion, Michigan Northern Power Co., p. 14.

international control. Eventually, the two governments agreed to constitute a joint board of control, consisting of one engineer from the public services of each country, which would supervise the regulatory works established by the two corporations. Disputes between the members of this board were to be appealed to the Commission for recommendation on motion of either government.[33] To this proposal the Commission demurred, and in the final order provision was made for such appeals, but for a decision rather than merely a recommendation. "If, as the Governments concede," said the opinion, "the Commission has the power to impose as condition to its Order the reference of these questions to it for recommendation, it certainly has the power to make that condition a reference for a decision." It pointed out, further, that differences between members of the board might be vital and require a prompt decision in the interests of the people on both sides of the line. If the Commission were to act merely in an advisory capacity, its opinion on a dispute would be merely a step for further negotiations between the two governments. Hence a final decision might be reached only after months of negotiation. This condition might accentuate differences between the governments and might defeat the very object of the treaty in providing suitable and adequate protection for interests endangered.[34]

Four orders now require the use of board control,[35] and one recommends it.[36] Three boards, however, the St. Mary's River Board, the St. Croix River Board, and the St. Lawrence River Board, have been found adequate.[37] A third step has occurred in the development of board control in the case of the latest board established. The orders setting up the St. Mary's River Board and the St. Croix River Board expressly provided that appeals to the Commission in the event of conflict between the board members should be brought by either government.[38] The order providing for the St. Lawrence River Board in 1922, however, lays directly upon the board the obligation to appeal to the Commission itself in the event of a disagreement between the members as to the exercise of their powers. The order goes even further and declares, "the board . . . shall have the right to apply in any circumstances where deemed necessary and advisable." The result of these provisions is to place the St. Lawrence River Board directly under the appellate and

[33] Order and Opinion, Michigan Northern Power Co., p. 16.

[34] *Ibid.*, p. 17.

[35] Michigan Northern Power Co., May 25, 1914; Algoma Steel Corporation, Ltd., May 27, 1914; St. Croix Water Power Co. and Sprague's Falls Mfg. Co., Nov. 9, 1915; St. Lawrence River Power Co., 1922.

[36] St. Croix River Fishways, Oct. 3, 1923.

[37] With these boards might be associated (a) the officers of the United States and Canada administering the distribution of water of the St. Mary and Milk Rivers, who, to all intents and purposes, constitute another board (see discussion of Art. VI later); (b) the Lake of the Woods Control Board, discussed later in connection with the Lake of the Woods treaty.

[38] Order and Opinion, Algoma Steel Corporation, Ltd., 1914, para. 17; Order and Opinion, St. Croix Water Power Co., 1916, para. 10.

advisory jurisdiction of the Commission[39] without the intervention of either government.

STATUS OF THE BOARDS

All the boards so far established under Article VIII have been called for in the Commission's orders after agreement between the two governments, hence the Commission has not been required to answer the question whether it has the power to require a board of control entirely on its own motion. But, as Senator (later Secretary of State) Kellogg pointed out in the hearing on the St. Lawrence River Power Company application: "If a board of control can be created it has to be done by this Commission and under the authority that this Commission now has . . . No assent of any officers of the two Governments can give authority to create any board of control over international waters without a treaty."[40] The sole question then is, Has the Commission the power under the treaty of 1909 to require a board?[41] This depends upon the meaning of the phrase, "suitable and adequate provision approved by it."

In the first place, does this authority to attach conditions include the right to lay obligations upon a government, or is it confined to laying them upon private persons? Where the government is an applicant in its own behalf there would appear to be no question; the difficulty arises over cases where the applicant is a private party. As will be explained later, an applicant may approach the Commission only through his government, which must first pass upon the application and then transmit it, if acceptable, to the Commission. The government concerned thus becomes the sponsor, and legally the real party to the case. Similarly, the other government becomes a party in its own interests and in its position as *parens patriae* in behalf of its citizens. Thus in any case both governments become parties, although through the treaty they have made provision for their nationals to appear and participate directly. Hence, it would seem that the Commission might at its discretion attach conditions laying obligations upon a government as well as upon its nationals.

Secondly, as was pointed out in the Michigan Power Company case, it may be necessary on occasion to provide supervision for protective works equally with requiring the works themselves, because the failure to supervise may be as productive of controversy between the parties as the failure to provide protective works—a result which the treaty was designed to prevent. In such cases, the Commission argued, it has full discretion both as to the

[39] Order and Opinion, St. Lawrence River Power Co., 1922, para. 3. The reasons for these changes seem to have been the conviction that the Commission could legally exercise a closer control over the board than had been provided for with respect to the other boards, and that the situation on the St. Lawrence demanded speedy action in the interests of navigation, should a disagreement arise between board members. See Hearings, 31 ff.

[40] Order and Opinion, 1922, p. 19.

[41] Senator Kellogg declined to answer this question. *Ibid.*, p. 20.

nature of the protective works and as to the means of their control, including the requirement for board control. The boards thus rest, not on *ad hoc* agreements between the two governments, but upon the orders of the Commission acting under the general powers conferred by the treaty to prescribe "suitable and adequate" conditions.

If the Commission can require the appointment of a board, and lay down rules for its guidance, could it go further and create the board itself? In such an event the board members would be officers of the Commission, responsible to it and not to their respective national governments. On this point no opinion has yet been rendered. It would seem to depend upon the question whether under Article VIII the Commission has executive power, or whether it is merely a quasi-judicial body capable of adjusting conflicting rights and interests as they are brought before it.[42] If it has executive power, it could then appoint boards of technical experts to administer the details of its orders, on the basis of Article XII, which provides that it may "employ engineers and clerical assistants from time to time as it may deem advisable." The Question then turns on the interpretation of Article VIII. The pertinent clause reads:

> The Commission shall require [in the case of diversions "may require"] as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

In the first place, the clause does not require the Commission to make "suitable and adequate provision" itself. It merely lays upon the Commission the duty of *requiring* that it be made. It evidently contemplates that this protection shall be furnished by other means than directly by the Commission. This seems to be borne out by the phrase "approved by it" which contemplates only approval or disapproval of means, not the enforcement of these by the Commission.

Secondly, the phrase, "suitable and adequate provision," relates only to the conditions to be attached to the order of approval for the diversion or obstruction contemplated. It does not grant to the Commission any new kind or quality of power. It merely enlarges the power which it otherwise enjoys, namely, that of permitting the exploitation of certain waters of concern to both states. Consequently, if the Commission has administrative power it must be sought elsewhere. And nowhere else in Article VIII is there a suspicion of such power.

Thirdly, it must be remembered that the Commission is not an institution, *sui juris*. It is rather a body with delegated powers which are derived from a treaty between sovereign states. In so far as the treaty takes away from

[42] This point was raised in the Michigan Northern Power Co. Case, the United States contending that the Commission had no administrative or executive power. The Commission, however, declined to answer the question in its opinion. See Order and Opinion, pp. 19–20, 23.

the sovereignty and independence of these states it should be interpreted strictly in their favor. A grant of power must, therefore, be expressed, not implied. Since no express grant of executive power appears in this article, we may safely conclude that it is not there.[43]

FUNCTION OF CONTROL BOARDS

While the functions of the boards vary according to peculiar local circumstances, those of the St. Mary's River Control Board are typical. The order of the Commission in The Michigan Northern Power Co. application prescribes that the board shall formulate rules for the operation of flood gates and by-passes; shall see that these are obeyed; shall supervise the keeping of accounts of water used by the applicants; shall be the final authority for the amount of water available at any time; and shall be responsible for seeing that no interference to navigation results from ice obstructed or diverted by the protective works constructed by the applicants.[44]

APPELLATE JURISDICTION UNDER THE LAKE OF THE WOODS TREATY, 1925[45]

The Lake of the Woods Treaty, 1925, as will be explained later, was the result of an investigation conducted by the Commission as to the levels which should be most beneficial to interests on both sides of the boundary and as to the methods of controlling these levels.[46] The treaty, which practically embodied the report of the Commission, provided for an International Lake of the Woods Control Board, consisting of one engineer from the public services of each country. (Art. III.) It is required to assume jurisdiction over the discharge from the lake (which occurs in Canadian territory) when the level falls below the minimum of 1,056 sea level datum provided in the treaty. (Art. III.) Further, it is to report upon the "suitability and sufficiency" of protective works which the treaty requires the United States to erect. Any disputes between the members on this point must be referred to the Commission, whose decision is final. (Protocol, para. 3.) Further, any dispute between the members of the board "as to the exercise of their functions" must be referred to the Commission, whose decision here is also final. (Art. VI.) Finally, the Commission has dis-

[43] See, however, observations by Senator Kellogg, St. Lawrence River Power Co., Hearing, 1922, pp. 19–20. Senator Kellogg thought that if a board could be created, it could only be created under authority of the treaty of 1909, and that the Commission could create it and keep it under its control. He failed to distinguish between the power to require a board and the power to create a board.

[44] Order and Opinion, Michigan Northern Power Co., pp. 8–9. *Cf.* also Orders and Opinions, Algoma Steel Corporation, Ltd., pp. 7–9; St. Croix Water Power, etc., pp. 5–6; St. Lawrence River Power Co., 1922, para. 3.

[45] Treaty and Protocol between Canada and the United States to Regulate the Level of the Lake of the Woods, Feb. 24, 1925; this JOURNAL, Vol. 19, No. 4, pp. 128–33.

[46] Investigation into Advisability of Maintaining Fixed Levels for Lake of the Woods, Ref. June 27, 1912; Report, June 12, 1917.

cretionary authority to sanction a recommendation of the International Board to raise the level of the Lake of the Woods beyond the maximum elevation of 1,061 sea level datum fixed by the treaty. (Art. V.)

The establishment of the Lake of the Woods Control Board by the authority of a special treaty is a clear indication of the usefulness of the method of board control over particular areas or projects under the supervision of the Commission. As has been pointed out, the earlier boards were created by implied authority only. Here the Commission blazed a new trail in international administration. The Lake of the Woods Treaty of 1925, by adopting the same method, indirectly confirms the action of the Commission. It is an indication that both parties view with approval the development of board control and a promise of its further application to the administration of boundary and other international waters.

CASES BEFORE THE COMMISSION UNDER ARTICLE VIII

To date fifteen cases under Article VIII have been disposed of by the Commission. Among the fifteen cases, one application was denied for lack of jurisdiction,[47] one was withdrawn,[48] one postponed,[49] and one was granted only a temporary order of approval which was later renewed.[50] Nine applications sought approval for obstructions in boundary waters or in waters flowing from boundary waters.[51] The specific obstructions proposed were: a timber boom in two instances, submerged weirs, dams across international streams, fishways, and abutments for an international bridge. Six applications contemplated diversions, in five instances for electric power, in one for domestic and sanitary purposes.[52] Diversions have been authorized from Shoal Lake and the Lake of the Woods, the St. Mary's, St. Lawrence, St. Croix, and St. John Rivers.

In dealing with these cases the Commission has been uniformly successful. We have discovered no instances where dissatisfaction has arisen over the orders of the Commission, whether on the ground of failure to protect interests endangered by the exploitation of waters permitted by the Commission or on the ground that the conditions attached were unreasonably onerous on the applicants. Nor have its orders ever been appealed from, either by

[47] Rainy River Improvement Co., Apr. 12, 1912.

[48] Canadian Cottons, Ltd., Mar. 22, 1919.

[49] New York and Ontario Power Co., Apr. 19, 1918.

[50] St. Lawrence River Power Co., Aug. 9, 1918. Renewed Dec. 5, 1922.

[51] Rainy River Improvement Co., Apr. 12, 1912; Watrous Island Boom Co., Apr. 6, 1912; International Lumber Co., Aug. 28, 1916; St. Clair River Channel, Dec. 29, 1916; New York and Ontario Power Co., Apr. 19, 1918; St. Lawrence River Power Co., Aug. 9, 1918; The State of Maine, Commissioner of Inland Fisheries, June 19, 1923; New Brunswick Electric Power Commission, Feb. 21, 1925; Buffalo and Fort Erie Public Bridge Co., June 13, 1925.

[52] Applications for diversion for power: Michigan Northern Power Co., June 30, 1913; Algoma Steel Corporation, Ltd., Jan. 21, 1914; St. Croix Water Power Co., Jan. 29, 1915; Sprague's Falls Mfg. Co., Jan. 29, 1915; Canadian Cottons, Ltd., Mar. 22, 1919. For domestic and sanitary purposes: Greater Winnipeg Water District, Sept. 8, 1913.

private persons or by the high contracting parties themselves. Neither have they been disobeyed, although the Commission has no powers of police to enforce its orders, nor power to punish for contempt as has a municipal court, nor power to appeal to a municipal court to enforce its orders except to subpoena witnesses and documents in the matter of hearing applications. (Article VIII, para. 8.) Further, although provision is made for an equal division of opinion, no instances of this have arisen; indeed, all but one case have been decided by unanimous opinion, and in this instance the application was dismissed for lack of jurisdiction on a four to two decision.[53]

II. Executive Duties under Article VI

Article VI of the treaty of 1909, which provides for the measurement and distribution of the waters of the St. Mary and Milk Rivers, makes provision for direct administrative control by the Commission.[54] The article provides: (1) "That the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power." (2) That the waters of these two streams should be divided equally between the two countries, but that either might have more than half of one stream and less than half of the other "in order to afford a more beneficial use to each," while during the irrigation season the United States should have a prior claim on 500 s.f. of the Milk, and Canada on an equal amount of the St. Mary, or in either case on so much as should amount to three-fourths of the natural flow. (3) That the "properly constituted reclamation officers of the United

[53] Rainy River Improvement Co., 1913.

[54] The dispute over the St. Mary and Milk Rivers was of long standing. These rivers rise in Montana and flow northward into Canada. The St. Mary is a tributary to the Saskatchewan; the Milk, after flowing for about one hundred miles through Canadian territory, returns to the United States and joins the Missouri. The St. Mary is a glacial stream and constant in flow; the Milk is seasonal. In Canada the valleys of both streams are irrigable, but in the United States only the lower Milk valley after the stream re-enters from Canada is suitable. For the land available here the waters of the Milk are entirely inadequate. The United States Reclamation Service proposed, therefore, to tap the St. Mary above the international boundary, to turn the water into the channel of the Milk, and to convey it through Canadian territory to the lower Milk valley. This scheme obviously required an agreement with Canada. Failing this the Reclamation Service proposed to dig a canal wholly through American territory to convey the water of the St. Mary to land less suitable but nearer at hand. Either scheme threatened vested Canadian interests which depended on a regular supply from the St. Mary. After long negotiation between the officers of both governments, an agreement was reached and embodied in the Boundary Waters Treaty of 1909. This agreement allowed the United States to carry out the former scheme while protecting Canadian interests by international control of the distribution of the waters of both streams as indicated in the text. H. of C. (Canada) Debates, 1910-1911, pp. 9101–23; U. S. Geological Survey, Water Supply and Irrigation Papers, 1905–6, No. 172, pp. 54–55; U. S. Reclamation Service, Annual Reports, 1903–4, pp. 79–82; 1907, pp. 114–119; Dept. Interior (Canada), Report on Irrigation, 1913, p. 10.

States and the properly constituted irrigation officers of His Majesty (Canada)" should measure and apportion the waters under the direction of the International Joint Commission.

These provisions indicate that the power of the Commission under this article is administrative, rather than judicial.[55] Its sole duty is to direct "the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty (Canada)." Yet, like any administrative body, it has to determine the meaning and scope of its mandate. Unfortunately, this is ambiguous. Canada contended that the phrase, "the St. Mary and the Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan)," meant all tributaries in the provinces and state mentioned.[56] The United States held that it meant only those crossing the international boundary.[57] The Commission held several public hearings on the question, but eventually abandoned the arguments of the lawyers and visited the scene of the operations in question, conferring there informally with the farmers and other interested parties.[58] Finally, in 1921 an order was issued disposing of the controversy on an equitable basis, by including only the eastern or Saskatchewan tributaries which flow into Montana, and recommending a comprehensive joint irrigation scheme which should be constructed partly in the United States and partly in Canada. The recommendations have so far not been acted upon. Nor can the order be held *res adjudicata* and binding on both countries, since it is merely an interpretation of an administrative mandate, not a decision in a case. However, since the persons and interests concerned seem satisfied, neither country has taken upon itself to challenge the order.

The position of the Commission in the administration of the project is briefly as follows. It lays down for the guidance of the reclamation officers of the United States and the irrigation officers of Canada assigned to the project, precise rules as to the establishment of gauging stations, and as to proportions of water to be delivered to each party during particular seasons. Reports must be rendered to the Commission as to the measurements of all gauging stations. Any disagreement in respect to duties laid by the Commission upon the officers concerned is to be reported by the officers to the Commission. Although no express provision is made, it would clearly follow that the Commission has final authority to dispose of such disputes, since the officers are required by the treaty to act under the Commission's direction. Finally, the Commission retains full power to vary, modify, or withdraw its order on its own motion.[59]

[55] See discussion by Senator Turner, Re-argument, St. Mary-Milk Rivers, 1920, pp. 42–5.
[56] MacInnes, Re-argument, St. Mary-Milk Rivers, 1920, pp. 83–136.
[57] Turner, *ibid.*, pp. 42–83.
[58] Burpee, L. J., Kiwanis Magazine, Sept. 1925, p. 353.
[59] Order, St. Mary-Milk Rivers, Oct. 4, 1921.

III. Powers of Investigation and Recommendation

Article IX states:

> The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters be so referred.

Under this article each state binds itself to coöperate with the other in requesting an investigation whenever the other requests it. Unlike Article VIII, which allows an application from either government to go directly to the Commission which then notifies the other government, Article IX would only permit of a reference for an investigation by mutual action of the two governments. Thus, while each government is under obligation to coöperate with the other on its request, there is no provision for the Commission taking jurisdiction on the motion of one government alone. The reason is obviously to prevent either government from using the Commission as a means of prying into the domestic concerns of the other.

It must be noted further that the obligation to coöperate in referring an investigation is incurred only with respect to international, and not domestic matters. It applies only to "questions or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other." In addition, even such matters must be "along the common frontier." Since a reference can arise only by mutual action, it remains with the two governments to determine beforehand, with respect to any investigation requested by one of them, whether the subject matter is included under Article IX. Thus, unlike the procedure under Article VIII, the question of jurisdiction is determined by the two governments, and not by the Commission.

In making investigations the Commission is authorized not only to examine into and report "upon the facts and circumstances" of any matter referred to it, but also to make "such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference." This authority gives to the Commission a position of influence in the formation of public policy by both countries which the mere power to collect data could never do. To avoid misunderstanding, however, the treaty emphasizes that the recommendations shall not be construed as decisions or arbitral awards, either on the facts or the law. (Art. IX, paras. 2 and 3.)

As is the case with decisions under Article VIII, reports of investigations may be unanimous, by majority, or there may be an equal division. Both governments receive a joint report when the Commission is unanimous, and

majority and minority reports when there is a disagreement. Separate reports are made by each national section to the respective governments when there is an equal division of the Commission along national lines. (Art. IX, paras. 4 and 5.) In each of the four investigations which the Commission has already undertaken, the reports have been unanimous.[60]

In referring to the subject matter of investigations, Article IX states that the questions or matters of difference may involve "rights," "obligations," or "interests." Undoubtedly by "rights" and "obligations" are meant legal rights and obligations, expressed by treaty or international law. "Interests," on the other hand, may not be legally secured; the term apparently would cover both claims, which one state may have upon the other as a matter of equity, and the mutual advantages accruing to both parties from the promotion of joint economic developments along the international boundary.

The Commission has so far completed four investigations. These were:

(a) The Livingstone Channel Investigation, 1913. This was conducted primarily at the instance of the United States Government in order to ascertain what effect the excavations and dredging, incident to improving the Livingstone Channel in the Detroit River, would have on the level and flow of waters on the Canadian side of the river. The Commission made recommendations for compensatory works.[61] The entire report of the Commission was adopted and followed by the United States.[62]

(b) The Pollution of Boundary Waters Investigation. This arose directly out of the treaty of 1909, Article IV of which states: "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." The actual pollution of waters, and the manner and extent of such pollution, were questions of fact which it was necessary to answer before the high contracting parties could fulfil their obligations to each other. The Commission, under its power of investigation conferred by Article IX, provided an admirable means for answering these questions. The problem of discovering the facts, together with the duty of recommending the means to be adopted to prevent future pollution of the specified waters, was, therefore, turned over to the Commission.

The task was probably one of the most extensive sanitary investigations ever attempted. A small corps of sanitary engineers and public health offi-

[60] With the exception that the American members filed a reservation in the Final Report, Lake of the Woods Reference. See Final Report, pp. 73, 76–109.

[61] Presumably, since the level and flow of waters on one side of the line were to be influenced by obstructions on the opposite side, the matter ought to have been submitted under Article VIII. (*Cf.* Articles III, IV and VIII.) Had Canada insisted, this might have taken place. Before conducting similar improvements in the St. Clair River Channel, four years later, the United States did submit the program to the Commission operating under Article VIII. However, in this case, the procedure furnished by Article IX was satisfactory to both governments.

[62] Report Livingstone Channel Reference, Apr. 8, 1913.

cials worked on the problem from 1913 until 1918, and covered boundary waters and waters flowing across the boundary from the Lake of the Woods watershed to the St. John River on the Maine-New Brunswick border. It was discovered that neither party was guilty of polluting the waters involved to the detriment of the other. On the other hand, serious conditions of pollution were discovered in certain areas along the Great Lakes, notably in the Detroit and the Niagara Rivers, where sewage from Detroit and Buffalo was making boundary water unfit for human consumption. Consequently, the Commission recommended that it be given authority to regulate and prohibit the pollution. This recommendation was not, however, acted upon. In 1919 the two governments requested the Commission to draft rules and regulations with reference to pollution. These rules, which were embodied in a draft treaty, have not so far been adopted.[63] On the other hand, several towns and cities on both sides of the border have adopted the recommendations of the Commission on their own motion, with the result that sanitary conditions along the Great Lakes are today greatly improved.[64]

(c) In the Lake of the Woods Reference, which was made to the Commission in 1912, the primary object was to determine scientifically the probable fixed level of the lake which would prove most beneficial to all interests directly or indirectly concerned. The interests most vitally affected were those of riparian landholders, of navigation, and of electric power. The investigation extended over a period of five years. The recommendations included a fixed level of the lake, a joint board under the surveillance of the Commission to maintain the fixed level by regulating the discharge from the lake, compensation to property owners whose interests were adversely affected by the fixing of the level, and the prohibition of diversions from anywhere in the watershed to any other watershed without the authority of the Commission.[65] These recommendations were subsequently embodied in the Treaty of 1925 to regulate the level of the Lake of the Woods.[66]

(d) The St. Lawrence Waterway Investigation from 1920 to 1922 was also a problem in engineering and economic development. Here the Commission was to determine what further improvements, either in the St. Lawrence River channel itself, or in canals alongside, were necessary for a waterway navigable for vessels of ocean draft between Montreal and Lake Ontario. Further, it was to advise as to the feasibility of linking up hydro-electric power developments with the navigation enterprise, to present a detailed program for executing the administrative features of any proposal it recommended, and finally, to render an estimate of both the capital and operat-

[63] Address, L. J. Burpee, Victorian Club, Boston, Feb. 17, 1919, p. 12. Final Report, Pollution of Boundary Waters Reference, Aug. 12, 1918. Draft treaty submitted by the Commission, Oct. 6, 1920.

[64] L. J. Burpee, Kiwanis Magazine, Sept. 1925, p. 352.

[65] Report on the Lake of the Woods Reference, June 12, 1917, pp. 39–40.

[66] Text in Supplement to this JOURNAL, Vol. 19, pp. 122–33.

ing costs of the scheme submitted and the basis for apportioning each of them between the two states. The Commission submitted an elaborate report of some eight or ten volumes, including detailed plans.[67] In view of the magnitude of the problem and the interests affected, the report recommended that the engineering features especially be investigated further by a larger international board of engineers. This recommendation was acted upon and the larger board has submitted its report. The project is still under consideration, but whatever the final outcome, the report of the Commission will be an important step in reaching a decision.

The first two investigations—that on the St. Clair Channel and that on the Pollution of Boundary Waters—sought to discover mutual rights and obligations of the high contracting parties. In neither case did an actual "difference" between the parties exist at the time. The second two—that on the Lake of the Woods Watershed and that on the St. Lawrence River Development—were concerned with the joint development and control of certain boundary waters for the mutual benefit of both parties. The potentialities of the Commission in another respect must not, however, be overlooked. All the problems investigated so far have been "questions" rather than "matters of difference." The treaty contemplates the use of investigations for the solution of both. There would appear, therefore, to be nothing to prevent the Commission from acting as a commission of inquiry should a real "difference" arise between the two governments as to their rights or obligations in respect to matters along the boundary. In short, the Commission could be utilized as an agency to bring about peace by conciliation, as well as a means of promoting joint economic interests. That it has not so far been called to such a task is evidence, not that the Commission is unsuitable, but that its handling of the questions so far submitted to it, and that the cordial relations which have existed between the two countries since the Commission was created, have prevented "matters of difference" from arising.

IV. Arbitral Jurisdiction under Article X

By virtue of Article X the Commission is also a permanent court of arbitration between the two countries. The article states:

> Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties.

This article may be open to two interpretations. In the first place, it may be limited by the preamble, which expressly states that the purpose of the treaty

[67] Commission's Report, Senate Doc. No. 114, 67th Cong., 2nd Sess.; Engineers' Report, Sen. Doc. No. 179, 67th Cong., 2nd Sess. Of this, the final conclusions of the Commission and of the engineers who worked under its direction have been published.

is to settle questions then pending or which might thereafter arise "along the common frontier."[68] If the preamble governs Article X, it would then be limited to "frontier" questions. As such, its purpose would be largely to supplement Articles VIII and IX, either in order to constitute a "last-resort" method when the Commission would be evenly divided over an application under Article VIII, or to settle questions which had already been investigated under Article IX, or probably to decide any controversy arising along the frontier which had escaped settlement under either of those articles.

On the other hand, if Article X be construed at its face value, there would appear to be no limit as to the geographical location of differences which might be submitted. This view is further supported if we compare Article X with Article IX, which relates to investigations. The phraseology as to the kinds of questions is identical with the striking exception that Article IX includes the qualifying phrase, "along the common frontier between the United States and the Dominion of Canada." This difference is surely not without meaning. Since Article X contains no such exception, nor indeed any express exceptions, it would appear that the framers contemplated the submission of "any question or matter of difference" whatsoever.[69]

Under Article VIII resort to the Commission is obligatory, but under Article X it is entirely optional, and can only occur when the two governments agree beforehand to submit a case.[70] Further, unlike Article IX, there is no obligation incurred by either to agree to a submission of a case at the request of the other. Article X, again, contemplates the submission of disputes after they arise. Article VIII, on the other hand, is intended to anticipate and hence prevent disputes. Article X, in short, empowers the Commission with arbitral authority, while Article VIII provides only for regulatory, or administrative authority.

As to the procedure used under Article X, it is, of course, necessary that the terms of the reference must be agreed upon by both parties as in ordinary cases of arbitration. The terms of reference might include specific or general directions as to the procedure to be adopted in the case. The rules of procedure adopted by the Commission declare, however, that wherever possible the rules which govern its deliberations under Article VIII shall be followed. Decision is to be by the majority. The treaty contemplates, however, the

[68] "To settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise."

[69] This is the view of L. J. Burpee, Canadian Secretary, The Dalhousie Review, Vol. 3 (1923–4), p. 174; of Hon. James Tawney, Minn. State Bar Association, Aug. 8, 1917. It is supported also by editorial comment, this JOURNAL (1912), pp. 192–3, and the Round Table, Vol. V (1915), p. 855.

[70] "It being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government, with the consent of the Governor-General in Council." (Art. X, para. 1.)

possibility of an even division. It is provided that in the event of such a contingency or other difficulty preventing settlement, a joint report is to be submitted to both governments, or separate reports showing the different conclusions, by each national group to both governments. The two parties are then legally required to refer the matters upon which the Commission failed to reach a decision to an umpire, selected in accordance with Article XLV of the Hague Convention of 1907 for the Pacific Settlement of International Disputes.[71] The umpire has power to render a final decision.

Article X has never been put to use, and hence is untested in the fires of practical experience. This is no doubt due in part to the efficiency of the Commission when acting under its other powers, and in part to the absence since the treaty was negotiated of questions of dispute other than those capable of settlement under Articles VIII and IX.[72] Other questions may, however, arise, and the Commission may not always be successful when acting under its other powers. For such occasions Article X is a potential "safety-valve." It may, however, be open to the theoretical criticism that it is likely to prove unworkable, because of the possibility of an equally divided opinion. Often disputes are submitted to arbitration only after it has proved impossible to settle them by diplomacy, and when national feelings have been roused on both sides. How, then, is an arbitral court likely to function, when each of the interested parties is equally represented, and when there are present no nationals of third states who might assist in reconciling the opposing views, or who, possessing the balance of power, might force a decision? For such criticism, the history of the Commission furnishes no evidence; indeed, such evidence as exists is directly to the contrary. In the fifteen cases under Article VIII the Commission has never divided along national lines, and only once has it been divided at all. Further, there is no doubt that a body composed of permanent, or at least long-term, appointees, such as is the Commission, develops an official tradition which is of itself an antidote to the virus of nationalism among its members, an antidote which scarcely exists in an *ad hoc* body. If the Commission should ever be called to function under Article X, it is believed that its mem-

[71] Article XLV, Chapter II, The Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907.

Para. 4: " . . . the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

Para. 5: "If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

Para. 6: "If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members selected by the parties and not nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire."

[72] Many minor questions between Canada and the United States have, of course, been settled by the British American Claims Commission. *V.* Nielsen's Reports, 1927.

bers could be relied upon to act as judges rather than as advocates, just as they have acted in all other instances.

ORGANIZATION AND PROCEDURE

The Commission consists of six members, three appointed by each party. (Art. VII.) Each national division chooses its own chairman, who in addition to performing the duties in his own state required to be performed by the chairman, acts as chairman at any meetings conducted on his own side of the boundary. (Rules of Procedure, 3.) Each national division appoints its own secretary, who is custodian of all records of the Commission for his own delegation, joint secretary with the secretary of the other division at all meetings of the Commission, and in charge of all correspondence and clerical work of the Commission as regards his respective state. (Treaty, Art. XII; Rules, 5.) The Commission, may, moreover, employ engineers and clerical assistants as it deems advisable, the expenses arising therefrom to be paid in equal shares by the two governments. The salaries and personal expenses of Commissioners and secretaries are borne by their respective governments. (Treaty, Art. XII.)

Two regular sessions of the Commission are held annually on the first Tuesday in April in Washington, on the first Tuesday in October in Ottawa. Special meetings may be called at any time and at any place in either country as agreed upon by the two chairmen. (Rules, 2.) In addition, the Commission is "subject at all times to special call or direction by the two Governments." (Treaty, Art. XII.)

The Commission was empowered by the treaty to draw up its own rules of procedure. For its guidance in this respect, it was expressly authorized to administer oaths to witnesses, to compel the attendance of witnesses and presentation of documents, and to make examination "in person and through agents or employees as may be deemed advisable." The only restrictions as to formulation of rules of procedure are, apparently, that they must be "in accordance with justice and equity," and must allow "all parties interested . . . convenient opportunity to be heard." (Treaty, Art. XII, para. 3.) Within these wide limits, the following procedure has been developed.

Under the Rules drawn up by the Commission in 1912, the Commission's powers to pass upon "uses, diversions or obstructions" of waters under its jurisdiction can only be called into play by the high contracting parties themselves. If either government contemplates a "use, obstruction or diversion," it must first make application to the Commission. (Rules, 6 (a).) If the applicant is a private person, corporation, or subsidiary division of government, the application must first have been submitted to the government within whose jurisdiction the proposed exploitation lies. The government concerned thereupon passes upon such application, and if it approves,

submits it to the Commission.[73] The Commission then proceeds to deal with it as if it were an application from one of the high contracting parties themselves. (Rules, 6 (b).) In both cases applications must include all necessary information, both as to facts upon which the application is based, and as to the nature of the order of approval desired. If the application is from a private source, all plans must be first approved by the government in whose jurisdiction the proposed works lie. (Rules, 8.)

On receipt of the application, the secretary of the Commission in the country other than that which makes the application or has authorized it, must notify his government and forward to it a copy of the application. (Rules, 9.) The secretaries are required to provide for publication of the application for three successive weeks in the Canada Gazette, and in two weekly newspapers, one on each side of the line, in the locality where the work is proposed, together with an invitation to interested parties to state their cases. (Rules, 9.) Within sixty days, or within such longer time as the Commission may determine, the government other than the one making or authorizing the application, and any private person with the consent of either government, may file with the Commission a statement in response. (Rules, 10.) Within thirty days following, the applicant or his government or both, may make statements in reply. (Rules, 11.) If the Commission so determine, supplemental applications and statements may be also called for, preliminary hearings may be arranged, or the Commission may communicate directly with and require answers from the parties. (Rules, 12, 14, 15.) Any private person may, with the consent of his government, enter at any stage into the proceedings as a party to the case. (Rules, 13.)

Final hearings may be held not less than sixty days after the time fixed for filing the statement in reply. (Rules, 20.) This provision has, however, been waived on several occasions when the Commission was satisfied that no interests would be prejudiced by a speedy hearing. Such hearings are public, and any person interested has a right to be heard by counsel. (Rules, 20.) The Commission, however, retains the right to decide "how many counsel are to be heard and what interests may be united for the purpose of the hearing," the length of the hearing, and the methods of presenting evidence. (Rules, 20.) Hearings, whether preliminary or final, are held wherever the Commission determines, and ordinarily near the location of the proposed work. In this way, private persons interested are enabled to state their case with a minimum of expense and inconvenience. During the final hearing, indeed, formalities are largely dispensed with.

As regards the submission of evidence, the rules are sufficiently broad and elastic to admit of getting at the facts without cumbersome technical procedure. The documents submitted by either party are apparently good evi-

[73] In Canada applications come through either the Department of Public Works or the Department of the Interior; in the United States, through the Secretary of War and the Secretary of State.

dence, whether sworn to or not. Either party may, however, demand for inspection copies of "any document, map, plan, or profile," and failure to submit such documents for inspection prevents their consideration as evidence unless the Commission is satisfied that the failure was due to "sufficient cause." (Rules, 16.) Unlike ordinary international tribunals, the Commission may subpoena, through the courts of either country, the attendance of witnesses and documents.[74] Further, it may itself authorize "examiners" in either country to obtain depositions under oath, and since it may employ engineers or clerical assistants, it could obviously use them for collecting expert testimony. (Rules, 19.) Finally, it may itself examine witnesses on oath, either through counsel or directly.[75]

At any time during the course of proceedings, the Commission may vary the procedure and take such action as "it deems expedient and necessary to meet the ends of justice and to effectually carry out the true intent and meaning of the Treaty." (Rules, 27.)

Although hearings may be conducted by a majority of the Commission, opinions and orders may be rendered only when all are present. (Rules, 22.) Opinions may be by majority, in which case majority and minority opinions must be rendered to both governments. In the case of an even division, "separate Reports shall be made by the Commissioners on each side to their own Government." The two governments are, however, under obligation to endeavor to adjust the difficulty directly, and if they succeed, to inform the Commission, which shall "take such further proceedings as may be necessary to carry out such an agreement." (Treaty, Art. VIII.) Fortunately, no instances of an equal division of the Commission have yet occurred, since all opinions but one have been unanimous.

Finally, it must be noted, that while the rules enumerated above were provided primarily for procedure under Article VIII, it is provided that they shall as far as possible be applied under Article IX, which deals with investigation, and Article X, which provides for optional arbitration. (Rules, 28.)

The Commissioners

Canadian Commissioners are appointed on "pleasure" by the King on the nomination of the Governor in Council, in effect, the Dominion Government. The Canadian section has always included experienced lawyers and one experienced engineer. Of six appointees, two have resigned, one to enter the Dominion Cabinet, the other on an elevation to the Bench of the Supreme Court of Canada. Two of the original appointees still remain in office. In

[74] Rules, 17, 18. Treaty, Art. XII. Applications may be made to the Superior Court of a Province in Canada, or to a Circuit Court of the United States. Rules of Procedure (1912), pp. 22, 23. Sundry Civil Appropriations Act, Mar. 4, 1911, Public, No. 525. Revised Statutes (Canada), 1–2 George V, cap. 28.

[75] Treaty, Art. XII. For comparison with rules of evidence and attendance of witnesses in arbitral tribunals in general, see Ralston, Arbitral Law and Procedure (1926), Ch. VI, VII.

no case has a Canadian commissioner been removed from office or compelled to resign.

American Commissioners are appointed by the President without confirmation of the Senate. Within a period of fifteen years thirteen appointments have been made; four appointees have died in office; six resignations account for the others.[76] Private sources of information arouse suspicion that some at least of these resignations have been the result not of personal choice but of political pressure for reasons of party convenience. But whatever the causes, such frequent changes in personnel seriously jeopardize continuity of action, a fundamental necessity whether of administrative or of judicial procedure.

Further the ease with which commissioners appointed by either party may be removed from office might conceivably constitute a threat at the Commission's independence. Fortunately no instances of using the appointing and removal power as a means of influencing the Commission's decisions are known, but the danger is evident. Both the United States and Canada take precautions that the judges of their municipal courts shall be independent of the executive and of any arm of government. One important means to this end is permanent tenure, or at least a definite term of office. The judges of the Permanent Court of International Justice are similarly rendered independent by being elected for a definite term of office. It would surely seem advisable that the Commissioners should be similarly independent, since they are to all intents and purposes judges on an international court and not diplomatic agents.[77]

Summary and Conclusion

The achievements of the Commission are proof of its value. Under Article VIII it has handled fifteen applications for the "use," "obstruction" or "diversion" of waters under its jurisdiction. Under the old régime of diplomacy many of these "cases" could only have been settled, if at all, after long and cumbersome diplomatic procedure. Several might easily have been a cause of serious friction between the two countries. The thirteen applications granted have been disposed of by the Commission without international friction or suspicion and within an average of seven and a half months each. Under Article IX, moreover, the Commission has established its usefulness as an investigating body through the four investigations it has successfully completed. While it has never functioned under Article X as

[76] This includes Senator Gardner, who was appointed twice and twice resigned.

[77] Apparently when the Commission was first set up there was some confusion of thought as to the status of the commissioners, and this may account for the failure to give them permanency of tenure. When appointing the Canadian section, the Canadian Government expressed in Parliament the opinion that Canadian Commissioners should be familiar with the Administration's point of view. *See* Sessional Papers, Canada, 1912, No. 119; H. of C. (Canada) Debates, March 30, 1912.

an arbitral tribunal, it is at least potentially more useful than the shadowy tribunals created by the usual arbitral agreements, because it is already a "going concern" with traditions established through its other activities. Under Article VI the Commission has established a system of administration under its direction which bids fair to be a final settlement of the long-standing controversy over the St. Mary and Milk Rivers and their tributaries.

A further test of a political institution is its growth or lack of growth in power and activity. The development of appellate jurisdiction through the system of board control and the reservations regularly attached to orders under Article VIII, that the case may be reopened at the request of any interest or person adversely affected, have added greatly to the Commission's potential activities. Further, its jurisdiction, both original and appellate, has been expressly extended by the high contracting parties themselves in the Lake of the Woods Treaty of 1925. These facts are sound evidence of its usefulness.

Wherein, then, lies its success? It would appear to be due to the following reasons: In the first place, to the permanent character of the Commission. As a permanent body meeting regularly and frequently it has been able to develop a technique in procedure and an *esprit de corps* among its members which are scarcely possible in *ad hoc* tribunals. Secondly, to the official independence of the Commissioners. To all intents and purposes they are judges of an international court, not governmental officers or diplomatic representatives. Indeed the sole connection they have with their respective states is in the matter of appointments and the payment of salaries. For decisions or conclusions in matters before them they are, like judges in a municipal court, responsible to none but their own consciences. Thirdly, to the simplicity and directness of procedure. Unlike the procedure in ordinary international tribunals, on the one hand, the Commission may subpoena witnesses and documents; on the other, any private person or interest affected in a case has the right to appear and be heard by counsel.

UNANIMOUS CONSENT IN INTERNATIONAL ORGANIZATION

By Norman L. Hill

Associate Professor of Political Science, University of Nebraska

The decisions of international bodies may be based either on the rigid principle of unanimity or on the more convenient doctrine that the majority shall govern. In a world where national sovereignty is so widely stressed, the former method has a natural appeal. The rule of unanimity has, in fact, been treated by many persons as an inevitable corollary of the theory of sovereignty, which, as it is generally understood, would subject no state to any limitation against its will. Such an idea was very probably in the mind of former Secretary of State Hughes when he stated in the opening address of the Conference on Central American Affairs in December, 1922, "Unanimity is a part of the consequence of the status of states in international law." Writers on international law have often so defined sovereignty and independence that the requirement of unanimity for any concerted action of a group of nations would follow. Lawrence, for instance, defines independence as "the right of a state to manage all its affairs, whether external or internal, without interference from other states, so long as it respects the corresponding right possessed by each full-sovereign member of the family of nations—this right of independent action is the natural result of sovereignty; it is, in fact, sovereignty looked at from the point of view of other nations."[1]

While it is entirely natural and even logical to assert a connection between sovereignty as a theoretical concept and the rule of unanimity, it is quite another thing to claim that the relationship consistently exists in practice. The absolute freedom of states to determine their lines of conduct is frequently abridged, as ordinary treaties and international law bear witness.[2] The new state that is admitted to the family of nations will have applied to it the rules of customary international law which have been formulated without its consent and to which it may hold an active objection. While the process of recognition may indicate a willingness on the part of an aspiring territory to accept the existing rules of international law as an alternative to isolation, it cannot obliterate the fact that there has been a submission to the majority. Similarly, the state that submits to arbitration for the settlement of a dispute puts itself under an obligation to accept a majority award in spite of a dis-

[1] Lawrence, T. J., International Law (1911), p. 111. See also Bluntschli, J. K. (1868), p. 506; Wheaton, H. (1866), p. 32.

[2] See "Limitations on Sovereignty in International Relations," by J. W. Garner, American Science Review, Vol. 19, No. 1.

senting vote of its own representative on the tribunal.[3] It is apparent that sovereign states frequently accept courses of procedure with which they steadfastly disagree.

In many instances, to be sure, prior consent is given in modern international organizations to the finality of whatever action may be taken, but serious doubt arises as to whether this device is in behalf of state sovereignty so much as of mere convenience. The observer is led to wonder why, if prior consent is sufficient protection to sovereignty in connection with the submission of disputes to a board of arbitration that uses majority vote, it is not an adequate safeguard to justify the use of the same procedure in an international conference. Evidently it is not the preservation of sovereignty that is sought so much as the maintenance of as wide a control over a situation as the circumstances permit. Throughout the whole field of international organization it appears that methods of voting bear a closer relation to practical matters of control and management than to any dictating theory.

Considering, in the first place, the methods of international conferences, we find that final decisions have customarily been based upon the common consent of all participating states. Prince Bismarck stated at the Congress of Berlin in 1878 that it is "incontestable that the minority in the Congress shall not be bound to acquiesce in the vote of the majority." The president of the Second Hague Conference remarked that, "The first principle of every conference is that of unanimity." The conventions of nearly every nineteenth-century international conference that has included representatives from a considerable number of states have been dependent upon the signature of all diplomats present.[4] There were rare exceptions, as, for instance, the refusal of the delegates of Saxony and Great Britain to sign the convention drafted by the Geneva Conference of 1864.[5] International gatherings since the World War have tended in the main to do homage to the earlier practice. The Washington Conference on the Limitation of Armament obtained unanimous consent for all of the treaties drafted and with but one exception for the resolutions which it drew up.[6]

In spite of the generally accepted rule of common consent, international conferences have been inclined occasionally to allow majority rule on matters

[3] See *La Ninfa*, 75 Fed. Rep. 513 (1896), in which the Behring Sea arbitration award was held to be binding upon the United States, against whom it had been made.

[4] See Satow, Diplomatic Practice, Vol. II, pp. 101–106, 111–112, 114–116, 117–118, 123–124, 132–134, 136–138, 138–147, for use of rule of unanimity on following conferences: conference on Belgian affairs (1830–31); conference for pacification of Syria (1860–61); conference for redemption of Scheldt dues (1863); conference on affairs of Denmark (1864); conference relative to use of explosive bullets in war (1868); conference of Brussels on rules of warfare (1874); conference on navigation of Danube (1883); conference respecting affairs of Africa (1884); and other similar conferences.

[5] *Ibid.*, Vol. II, p. 118.

[6] Conference on Limitation of Armament—Government Printing Office (1922), pp. 278–395. The resolution relative to the Chinese Eastern Railway did not have China's consent.

of minor importance. The Second Hague Conference of 1907 agreed that a majority vote would entitle a proposal to be recorded as part of the proceedings.[7] This arrangement could in no wise affect the final work of the organization and it had the limited merit of permitting states to make their positions clear before the eyes of the world. Other matters of procedure have also been exempted by diplomatic gatherings from the regular requirement. The Geneva Conference of 1868 ruled that a mere majority vote would entitle a measure to be brought up for discussion, though unanimity would be required for final adoption.[8] Still another method of deviating from the usual practice has been to allow the plenipotentiaries of conferences to sign with reservations the Final Acts, which are mere summaries of the proceedings and are not conventional agreements requiring ratification. The Swiss Delegation at the Second Hague Conference made a reservation at the time of the signature relative to *Voeu* No. 1, which the Federal Council of Switzerland would not accept.[9] On account of the nature of the contents of the Final Act, this practice could scarcely be objectionable from any point of view.

The results of the rule of unanimity in international conferences have not been reassuring. It has proved to be highly dilatory in some cases, and intolerably obstructive in others. Sir Edward Fry, a British delegate at the Second Hague Conference, commented very unfavorably upon the practice regarding it as a handicap to effective action, and he suggested that the next conference at The Hague rid itself of the encumbrance.[10] At the first Hague gathering in 1899 the Roumanian vote alone defeated the original draft of the convention for a Commission of Inquiry.[11] In other instances where conferences have subscribed to the rule of unanimity in principle its application has been distorted by a weighing of the votes of dissenting nations, and where feasible, agreeing upon a course of action in spite of a small amount of opposition, leaving the obstructing states to decide for themselves whether they will fall in line or discontinue their participation. The Peace Conference at Paris adopted the Treaty of Peace without the signature of the Chinese delegation, choosing to ignore their objection.[12] The Washington Limitation of Armament Conference adopted a resolution relative to the Chinese Eastern Railway in opposition to the Chinese vote.

It is comparatively easy to discover the abuses and difficulties that go with the requirement of general consent at international conferences, but it is not

[7] Satow, *op. cit.*, Vol. II, p. 157. [8] *Ibid.*, p. 126.

[9] Scott, J. B., The Hague Conventions and Declarations of 1899 and 1907, pp. 39–40. Published by Carnegie Endowment for International Peace.

[10] Woolf, L. S., International Government, p. 58.

[11] Hull, W. I., The Two Hague Conferences (1908), pp. 280–285.

[12] Temperley, H., History of the Peace Conference at Paris (1920), issued under auspices of The Institute of International Affairs. See Vol. I, p. 390, footnotes. China later arranged to sign the treaty.

so simple to devise an alternative. An agreement adopted by the rule of the majority in opposition not only to the will of individual delegates but also to their instructions would stand small chance of a general ratification later by the governments represented. Consequently, if a proposal be of such a nature that to be effective it must be adhered to universally, the rule of unanimity at an international conference provides a short-cut means for disposing of it, saving the time which would otherwise be consumed by national governments in considering ratification. On the other hand, international organization has not arrived at the stage where participating states will send representatives to conferences without instructions and with the understanding that majority decisions binding upon the governments concerned may be imposed. The majority principle might be utilized to advantage in connection with proposals whose effectiveness would not be vitiated by a lack of general application, but unfortunately most of the projects submitted at conferences are not considered to be of that type. The element of competition will not often permit a state to be exempt from the jurisdiction of a rule or from participation in a common action without probable objection from the remainder of the group. The treaties framed by the Washington Conference of 1921–22 were considered to be so dependent upon a general acceptance that it was provided that they should not go into effect until the date of deposit of all ratifications. Usually the agreements that are least apt to have unanimous consent because of their highly controversial character are the ones which will be withheld from application unless all participating states become signatories and ratifiers.

In public international unions the states of the world have been somewhat less hesitant to forsake the rule of unanimity than in international conferences. The numerous instances of the employment of the idea of majority control may be explained by the nature of the functions of public international unions. Aside from their regular conferences, they deal for the most part with administrative questions, and only to a minor degree with the formation of policy. Usually the large questions of policy are taken care of in the conventions or constitutions of the respective unions, as established by the conference, and the chief duty of the other machinery is to apply their provisions. Such work may entail a choice of methods and a consequent need of balloting and making decisions. In some instances the subject matter is of a comparatively exigent character, though non-political, so that prompt and effective action becomes the alternative to complete failure. Where such is the case the requirement of unanimity would be an intolerable impediment. In other circumstances the affairs under regulation do not affect vital interests and the application of majority decisions to objecting states could not constitute a serious infringement upon their supposed autonomy.

The general congress or conference of public international unions operates usually on the basis of unanimity, even when other organs of control use the

majority rule.[13] The apparent reason is that the conference is made up of diplomats, and is at once the constituent assembly and the legislature for the whole organization. It is very much the same as any other international conference in composition and functions and therefore quite similar in methods. Questions of policy are frequently involved in such organizations, and here, as elsewhere, states are slow to bow as minorities to the will of the greatest number. There have been a few notable exceptions to absolute unanimity among the representative bodies of public international unions. Where a quorum is sufficient to conduct the business of the organization and states that have no representatives present are presumed to be equally bound by actions taken in their absence there may occur a form of majority control, less significant, to be sure, than is to be found in other connections. In the general assembly of the International Institute of Agriculture it is provided that two-thirds of the total membership constitutes a quorum.[14] There are several possible results that may follow from this practice. On the one hand, it may happen that absence from a meeting which one is entitled to attend is meant to be the equivalent of consent to whatever actions are taken, and that the requirement of unanimous consent is not thereby forsaken. The possibility of such an intention is increased by the fact that an agenda of the business to be taken up is generally in the possession of member states, and they are therefore able to know in advance whether the subjects to be discussed are ones on which they care to register a vote. There are other circumstances, however, where the quorum provision may involve a definite application of majority action. Where there are justifiable reasons for absence, such as remoteness or expense, a non-participating state is expected to submit to actions taken by those who were present. States which are members of the International Labor Organization have failed occasionally to send representatives for reasons of that sort. Such instances are evidence of a definite breach of the rule of unanimity in the interest of convenience. A more obvious application of the majority principle may be seen in the conferences of several public international unions, where matters of comparative insignificance are managed by the will of the greatest number. The Universal Postal Union, for example, allows either a two-thirds or simple majority vote on minor questions.[15]

The commissions and bureaus of international administrative agencies have made use of the majority principle more frequently. In some cases they have had rather thoroughgoing powers of control, at least over local affairs. Most noted among the group was probably the Sugar Commission, which has now become defunct. That body was able to decide by majority vote such questions as the determination of the existence of bounties and the levy of a surcharge against a contracting state.[16]

[13] See Reinsch, P. S., Public International Unions (1911), p. 152.
[14] *Ibid.*, pp. 152–153.
[15] See Reinsch, *op. cit.*, p. 26.
[16] *Ibid.*, p. 50.

International commissions in charge of rivers have frequently been free from requirements of universal consent. The Rhine River Commission, created over a hundred years ago, allows majority vote, but with the unusual provision that the votes are not binding until approved by the governments themselves.[17] The Danube Commission may act on certain issues by majority vote, such as the modification of tolls, but general consent is necessary on questions of principle.[18] International Sanitary Bureaus and the Governing Body of the Universal Postal Union commonly permit the will of the greatest number to prevail. In some administrative bureaus the rule of unanimity is open to the possibility of violation on account of the use of quorums to transact business. For instance, the Governing Body of the Pan-American Union, which is composed of the diplomatic representatives of member states at Washington, is empowered to act with a quorum of five present.[19]

It is appropriate to comment at this point upon the extent to which states have allowed themselves to be imposed upon by majority groups in public international unions. If unanimous consent in every action of a discretionary nature be inseparably connected with the doctrine of state sovereignty, then it must be candidly admitted that the latter has been infringed upon. Prior consent on the part of member states may have been given at the time of admission into the organization, but it hardly precludes the fact that in specific instances nations have been unwilling minorities. England in the International Sugar Commission was obliged against her will for several years to impose compensatory duties against sugar coming from countries granting sugar bounties.[20] Rumania has been opposed on occasions to the actions of the Danube River Commission.[21]

International arbitral and judicial machinery have been still more prone to practice the rule of majority control than the preceding forms of international organization. Article 30 of the Hague Convention establishing the International Commission of Inquiry provides that "all questions are decided by a majority of the members of the commission." A similar provision is to be found in Article 78 relative to the activities of the Permanent Court of Arbitration at The Hague, and in conformity with it the awards of the tribunal have in practice been founded upon majority action.[22] In fact, on account of the nature of the personnel of such bodies unanimity in the settlement of a case would be highly improbable. Each party to the dispute has representatives present, who are often inclined to favor their own states, and consequently a divided ballot is well nigh inevitable, with the neutral members of the organization casting the deciding votes.

[17] Sayre, F. B., Experiments in International Administration (1919), pp. 155–158.
[18] *Ibid.*
[19] Reinsch, *op. cit.*, p. 117.
[20] Sayre, F. B., *op. cit.*, p. 127.
[21] *Ibid.*, p. 45.
[22] Provision is also made for dissenting opinions, in accordance with which the losing side is privileged to make public its findings.

For its most important work the Permanent Court of International Justice also acts on the majority principle. Decisions of cases and advisory opinions are on such a basis, with the provision that in the event of an equality of votes the president or his deputy shall have a casting vote.[23] If there is a lack of unanimity, dissenting judges are entitled to deliver a separate opinion. By allowing a quorum of nine to constitute the court when eleven judges are not available, the statute further permits decisions without common consent.[24] The choice of the officers of the court and of assessors for the Labor Chamber is also by the majority rule.[25] Where unanimity is required it is only to insure the independence of individual judges as, for instance, the rule that no one of them may be dismissed except by common agreement of the others.[26]

In practice it has happened that the Permanent Court of International Justice has rendered a large number of unanimous decisions and advisory opinions. Of the first three advisory opinions given on questions relating to the International Labor Organization only one was the product of a majority.[27] The German Settlers' case and the dispute regarding the French nationalization decrees in Tunis and Morocco, both advisory opinions, were also unanimously handled by the court, among others of a similar nature.[28] On the other hand, the *S.S. Wimbledon* judgment of 1923 was a nine to three decision, and in the Mavrommatis Concessions case of the following year the court decided favorably on the subject of its jurisdiction by the narrow margin of one vote.[29] Whether unanimous or majority decisions have been made seems to have depended merely on the merits of the case.

It might seem at first thought that the reason that nations display a willingness to permit majority awards by the Permanent Court of International Justice is the essentially neutral and unrepresentative character of its judges, who by the statute are to be "elected regardless of their nationality from persons of high moral character."[30] It would appear to follow that decisions are rendered by disinterested individuals, and not by a majority group of states. Judges are detached and independent agents chosen by the League, according to the theory of the tribunal, not diplomats sent by member states. Such an explanation is open to several objections. In the first place, the majority principle was applied in arbitral bodies before the Permanent Court of International Justice was created and the board of arbitration was, for the most part, composed of agents with at least a semi-diplomatic character. Furthermore, the judges of the World Court are not entirely divested of a representative character. They may be unconnected with states of their respective allegiance in determining their course of action, but still be representative of the large body of court members considered as a

[23] See Statute of Court, Arts. 55 and 57.
[24] *Ibid.*, Art. 25.
[25] Rules of the Court, Arts. 7, 9, 17.
[26] Statute of the Court, Art. 18.
[27] Bustamante, A. S., The World Court (1925), pp. 267–272.
[28] *Ibid.*, pp. 273–275. 279–282,
[29] *Ibid.*, pp. 295–299.
[30] Statute of the Court, Art. 2.

group. Consequently a decision of the court, whether it be made by a majority or unanimously, may after all be considered as an attempt of the entire membership to force its will upon any state that has been on the unfortunate side of a dispute.

It is probable that the optional nature of the jurisdiction of international arbitral or judicial tribunals is a partial explanation for use of majority decisions by those bodies. By reserving the right of refusing to submit a dispute to an international body for settlement, states may maintain a degree of control which is deemed to be sufficient. In other words, there may be involved a rather definite application of the doctrine of prior consent, not as a theoretical reconciliation of the majority vote with state sovereignty, to be sure, but simply as a practical explanation of the willingness of states to relinquish control of affairs of importance at one point so long as they may keep it at another.

The consideration of convenience appears to be the main inducement to states in allowing majority decisions in arbitral and judicial bodies with less hesitancy than in the other branches of international organization. If unanimity were demanded in tribunals chosen to settle disputes through the application of law, there would be a good many cases of deadlock, quite similar to those produced in international conferences but with more disastrous results. Presumably a dispute is of such a nature that it should be dealt with quickly and effectively, whereas the subject matter of a conference can more readily suffer delay.

The machinery of the League of Nations is further illustrative of the somewhat opportunist attitude of international organizations to use whatever basis of consent may be best suited to the occasion without too much quibbling over theoretical questions. Article 26, as amended, allows changes in the Covenant when voted on favorably by three-fourths of the representatives in the Assembly, and ratified by those states of the League that compose the Council plus a majority of those who make up the Assembly.[31] Any nation which prefers not to be bound by such an amendment may, within a period of one year, notify the Secretary General of the League, in which case it shall cease to be a member. The process rather obviously permits an action to be binding upon minority groups who choose to remain members rather than to maintain their own freedom of action on the question involved and be forced to withdraw.

The two most important organs of the League of Nations, the Council and the Assembly, are permitted to make use of various methods of voting. Article V of the Covenant provides:

> Except where otherwise expressly provided in this covenant, or by the terms of the present treaty, decisions of any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting.

[31] The League of Nations, World Peace Foundation, Vol. VIII, Nos., 8–9, p. 596.

> All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the members represented at the meeting.

By the rules of the Council actions may be taken when a quorum consisting of a majority of the members is present.[32] This is a concession to practical necessity which no smooth-running organization can fail to make. On matters of importance the unanimous consent of those who are present is generally required, while unimportant decisions are taken on a majority basis. The Assembly in seven classes of questions and the Council in thirteen may be governed by the votes of the greatest number.[33]

Where unanimity among those present is required of the organs of the League, it may prove on some occasions to be so obstructive as to prevent action. That fact has been brought out during the attempts of the Assembly to make interpretations of articles of the Covenant through the medium of resolutions, an undertaking which requires the unanimous consent of those members who are in attendance. In 1923 at the Fourth Assembly meeting there was proposed by the First Juridical Committee an interpretative resolution of Article X, in accordance with which it would be for the "constitutional authorities of each member to decide in reference to the obligation of preserving the independence and the integrity of the territory of the members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces."[34] Persia was the only state present that voted in the negative. Twenty-nine voted affirmatively and several did not vote at all. The resolution was considered, therefore, to have failed of passage. The vote of Brazil at the meeting of the Council in March, 1926, on the issue of admitting Germany to the League, was sufficient to make action at that time impossible.[35]

The methods of voting used by the organs of the League seem, when viewed at large, to be in harmony with no particular principle but rather to be based upon practical considerations of utility and control. Those functions of the League which are of a comparatively important and far-reaching

[32] Rules of the Council, Art. 6.

[33] See Buell, R. L., International Relations (1925), p. 668. The Assembly acts on majority principle in the following instances: (1) Election of non-permanent members of Council, (2) Election of new members of League, (3) Election of Judge of World Court, (4) Approval of additional Council members, (5) Choice of Secretary-General, (6) Report on international disputes, (7) Questions of procedure. The Council allows majority rule in following instances: (1) questions of procedure, (2) settlement of disputes, (3) questions relative to the Saar, (4) military control of defeated Powers, (5) Albania's independence, (6) the Aaland Island convention, (7) *protriots* regarding economic reconstruction in Austria and Hungary, (8) Memel, (9) Greek Refugee Settlement Commission, (10) the Oriental railway, (11) Germany's obligations toward allied states, (12) changes of provisions in minority treaties, (13) revision of Arms Traffic Convention.

[34] Records of the Fourth Assembly, Plenary Meetings, p. 86.

[35] The League of Nations News, Vol. III, No. 52, p. 3.

nature, such as the settlement of disputes, have been zealously safeguarded in their exercise by a requirement of unanimity on the part of all representatives who are present. Matters of less significance, such as methods of procedure, the choice of presiding officers, and the election of new members of the League, may be treated on the basis of some form of majority rule, either by allowing a vote of more than one-half of the total to be decisive or by demanding a two-thirds acquiescence.

The International Labor Organization also makes use of diverse methods of voting. Amendment of the labor provisions of the treaty is possible without unanimity.[36] In the conference of the organization the presumption is in favor of decisions by simple majority "except as otherwise provided."[37] Among those exceptions is the very important one that two-thirds of the votes cast by the delegates present is necessary for the adoption of a recommendation or a draft convention.[38] This widespread use of majority voting in one form or another in the most important work of the Labor Conference appears at first to be rather startling, but is entirely comprehensible when one takes into account the position of the delegates. They are not considered to be plenipotentiaries authorized to sign for their governments.[39] The government delegates ordinarily act under instructions, to be sure, but even their votes for or against a convention in the conference do not bind their governments in any sense whatever. Regardless of how its representatives have voted, every state is free to determine the final action. The only obligation assumed by member states is to submit within a limited time the measures passed by the conference to the authority competent to adopt them and put them into force. Consequently the whole situation is quite different from the ordinary international conference where actions of diplomatic representatives are considered to have created a more or less definite duty of states to ratify what has been signed.

It could scarcely be held that the emphasis of current methods of voting in international organizations on mere convenience is reprehensible. If unanimity were a necessary corollary of state sovereignty, it would be futile to expect any very rapid progress in the use of the majority rule; but if the whole question be one of policy there may be some reason to hope that the more lenient method will gain wider recognition. The future of international organization is dependent in part upon an extension of the powers of control

[36] The Treaty of Peace, Art. 422. See International Conciliation, No. 142. The article reads, "Amendments to this part of the present treaty which are adopted by a majority of two-thirds of the votes cast by the delegations present shall take effect when ratified by the states whose representatives compose the Council of the League of Nations and by three-fourths of the members."

[37] Treaty of Peace, Art. 403.

[38] *Ibid.*, Art. 405. See also Art. 407, which permits a group of less than two-thirds to coöperate among themselves for the adoption of a convention.

[39] "The Attempt to Establish the Eight-Hour Day by International Legislation," by H. Feis, Political Science Quarterly, Vol. XXXIX, Nos. 3–4, p. 376.

of existing agencies over the situations that come within their jurisdiction. The use of the majority principle is one obvious method for the realization of such an aim, and its acceptance in practice is the more probable if it is not tied up with an obstructive theory.

THE DEVELOPMENT OF INTERNATIONAL LAW SINCE THE WAR*

By Manley O. Hudson
Bemis Professor of International Law, Harvard Law School

We are now approaching the end of the first decade following the World War. Perhaps we are sufficiently removed from the heat and passion of that struggle to attempt to gauge the progress which the world has made in the development of international law since it was ended. Ten years is a brief period in any field of history; but before this decade was begun, most of us felt that it was going to see great things accomplished toward broadening and strengthening and extending the law by which the relations of states are governed. The war brought a challenge to our international legal order which could hardly have failed to create for our generation an opportunity to leave an impression on international law, such as has been left by no other generation in the three hundred years since the time of Grotius. As the decade is ending, and as our generation begins to find its energies so absorbed in other tasks, an appraisal of the progress we have achieved may enable us to judge the use we have made of our opportunity and the extent to which it still exists.

EXPECTATIONS OF A DECADE AGO

Among the thirty peoples who were engaged in the World War, it became a popular impression that the commencement of the war and the manner of conducting it had brought about a complete collapse of international law. Before 1914 there had been some disposition to believe that a general war would result in a vindication of international law. Writing in 1889, the author of a leading English treatise, W. E. Hall, had predicted that "probably in the next great war, the questions which have accumulated during the last half-century and more, will all be given their answers at once." He foresaw that the war would be "unscrupulously waged," but also that it would "be followed by a reaction toward increased stringency of law"; and he looked forward "with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules which now exist."[1] But there were few people who kept that confidence once the flood-gates of force had been opened. As each belligerent nation sought in vain for a law which would restrain its enemies, as each neutral nation sought in vain for a law which would relieve it of the burden-

* A paper read before the Bar Association of the City of New York, February 16, 1928.
[1] W. E. Hall, International Law (3rd ed.), p. x.

some incidents of the struggle, the insufficiency of our pre-war law came to be felt in every part of the world. Its principles seemed inadequate, its limitations ineffective, and its bases insecure. In many quarters, belief in the utility of a law of nations was weakened, and faith in the efficacy of any effort to increase its authority was lost. Even our legal profession failed to withstand the effect of the general scepticism, and we allowed to be revived the futile discussions of the Austinian era as to the existence of a law of nations which might properly be called law.

The changes in opinion during the war were nowhere more evident than in America. Our national experience carried us through all the stages of insistence. After our recovery from the first shock of 1914, we thought of the United States as the leader in the effort to maintain the delicate structure of the law of neutrality as it had been builded during the nineteenth century. In 1915, our Secretary of State informed the British Government that "the United States unhesitatingly assumes" the "task of championing the integrity of neutral rights which have received the sanction of the civilized world, against the lawless conduct of belligerents arising out of the bitterness of the great conflict which is now wasting the countries of Europe," adding that "it is of the highest importance to neutrals, not only of the present day but of the future, that the principles of international right be maintained."[2] In 1916, President Wilson spoke of the United States as "a representative of the rights of neutrals the world over," and Americans became in his thinking the "responsible spokesmen of the rights of humanity."[3] But when we entered the war a year later, our government showed but scant sympathy for the efforts of other Powers to uphold "the integrity of neutral rights." We still professed a concern about the "freedom of the seas," but we did not allow it to interfere with our concern for the freedom of democratic society. We transferred our interest from the particular to the general. On April 27, 1918, the Executive Council of the American Society of International Law expressed the popular fear when it issued a warning that "the very existence of international law is now at issue," and that "the only great question of international law today is whether that law shall continue to exist."[4]

Yet throughout the dark days of doubt, most peoples kept a measure of determination that their sacrifices should in some way contribute to a new buttressing of the legal order in international relations. As is always the experience in war, objectives changed rapidly. Juridical problems which were much discussed at the beginning soon lost the center of the stage of interest. When the war had ceased, other problems, political and economic, seemed more important. Peoples' attention had to be given to political map-making, to plans for international organization, and to economic re-

[2] This JOURNAL, Vol. 10, Special Supp., p. 88.
[3] James Brown Scott, President Wilson's Foreign Policy, pp. 156–7.
[4] This JOURNAL, Vol. 12, p. 338.

construction. The temper for dealing with problems which did not press for immediate solution was lacking. The rifts which had widened during the war had made it more difficult for general legislative coöperation to be undertaken. The world was in a worse position for a consideration of the more critical problems of international law when the war ended than before it began. The regeneration of mankind, of which many people had dreamed, was at once interrupted by the effort to return to the *status quo ante*.

But in spite of these facts, some gains have been made during the past decade. Our opportunities have not been wholly neglected, and if our expectations have not been fulfilled, some explanation is found in the excited judgment which prevailed when they were entertained. To discover where the gains are, and what is their significance, let us look first at the law of war and neutrality as it exists ten years after the war, examining afterward the present state of the law of peace.

LAW OF NEUTRALITY

While the United States was neutral, we were sorely tried by interference with our commerce both by the British and by the Germans. At one time, it might have been difficult for us to say which gave us the greater annoyance. The questions which arose with the British Government were hardly less serious than those which a century earlier had led us into the War of 1812. It was a controversy over the impressment of American seamen which we then sought to settle by a resort to arms. Judge John Bassett Moore has pointed out that President Madison gave that controversy "the chief place in his message of June 1, 1812, recommending war with Great Britain; but in the treaty of peace concluded at Ghent on December 24, 1814, it was not mentioned."[5] In fact, the impressment was not discontinued until the end of the Napoleonic Wars. That experience might have fortified our restraint in the World War, and it might have encouraged the belief that a victory in war will not vindicate international law.

Yet in 1917, when for various reasons we decided to cast our lot with the Allies, there were many people who assigned as our case against Germany, her violation of our rights at sea. During the early months of 1917, our claim to freedom for American vessels to sail the seas without interference had been the only subject of our controversy with Germany. Addressing the Senate on January 22 of that year, President Wilson declared the "freedom of the seas" to be a "*sine qua non* of peace."[6] Though he did not stress this point in his request for a declaration of war by Congress, the declaration itself referred only to the state of war thrust upon the United States by Germany.[7] Some months later, in the second of his Fourteen

[5] John Bassett Moore, Principles of American Diplomacy, p. 114.
[6] James Brown Scott, President Wilson's Foreign Policy, p. 211.
[7] 40 U. S. Statutes at Large, p. 1.

Points of January 8, 1918, the President demanded "absolute freedom of navigation upon the high seas, outside territorial waters, alike in peace and in war."[8] But when the war ended, the Allied and Associated Powers entered the peace conference with a reservation of "complete freedom on this subject"; and neither the Treaty of Versailles nor the later Treaty of Berlin between the United States and Germany, dealt with it in any way. In other words, the history of the War of 1812 repeated itself.

The main questions of international law which arose while the United States was neutral and which in time dragged us into the war against Germany and Austria-Hungary, were in no way disposed of by our victory. In fact, the law either remains exactly what it was, or it has been modified by the very practices to which we objected. If the "freedom of the seas" was a real issue in 1917, the possibility of the same issue still remains. For since that time neither our controversies with Great Britain nor those with Germany have been in any way settled by agreements with those countries, and if another such war were to occur today, the state of our international law would be as unsatisfactory as it then was.

During the past year we have had a reminder of this inconclusive result of the war, so far as international law is concerned. On May 19, 1927, the United States and Great Britain concluded an arrangement by exchange of notes for the disposal of certain pecuniary claims arising out of the war.[9] It was doubtless at the suggestion of the Government of the United States that the arrangement was made to include the following statement: "the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality, under international law, of measures such as those giving rise to claims covered" by the arrangement, "is fully reserved, it being specifically understood that the juridical position of neither government is prejudiced by the present agreement." This is a clear affirmation that while the United States may again contend that international law does not justify an enforced call of American vessels at British ports in time of a war in which the United States is neutral, Great Britain may again contend that such a course is justified. Not only have we reached no agreement in the decade that has passed, but we have now made it a matter of formal record that there is no agreement.

Nor has any attempt been made to reach an agreement with Germany concerning the questions of international law which arose in 1917. At the Washington Conference in 1922, at which Germany was not represented, three rules to govern interference with merchant vessels were drawn up as "universal rules," from which "belligerent submarines are not under any circumstances exempt." These rules were embodied in a treaty, signed on February 6, 1922, on behalf of the United States, the British Empire, France,

[8] James Brown Scott, President Wilson's Foreign Policy, p. 319.

[9] U. S. Treaty Series, No. 756; this JOURNAL, Vol. 21, pp. 542–544. See the excellent comment by Edwin M. Borchard, this JOURNAL, Vol. 21, p. 764.

Italy and Japan.[10] The treaty stated that those Powers declared that the rules "are to be deemed an established part of international law." Even if all the signatories had ratified the treaty, their *ipse dixit* could hardly have made them so; but the treaty has not been ratified by any of the signatories, and it now seems doubtful whether a deposit of the necessary ratifications ever will be made. The same treaty was designed to establish a prohibition on the use of submarines as commerce destroyers, but no such prohibition is in effect today. If Germany should again become a naval power,—and it seems doubtful whether her disability under the Treaty of Versailles can endure forever,—international law as it stands today would put no restriction on her use of submarines which did not exist in 1917.

LAW ON THE CONDUCT OF WAR

Nor has much substantial progress been made with respect to the international law governing the conduct of war, in spite of the dissatisfaction with the action of belligerents during the past war. The treaty signed at the Washington Conference on February 6, 1922, contained a prohibition on "the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices," to the end "that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations." The fact that the treaty containing this prohibition related also to the use of submarines may have retarded its ratification. As it had not been brought into force when the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War met in Geneva in 1925, the representative of the United States at that Conference, Mr. Theodore E. Burton, proposed a new protocol relating to the subject. This protocol, signed on June 17, 1925,[11] repeats the prohibition of the Washington treaty and extends it "to the use of bacteriological methods of warfare." On August 31, 1927, this protocol had been signed by representatives of thirty-eight governments, but only France had ratified it.[12] Other governments seem to be waiting for action by the United States, and our Senate has so far refused to give its advice and consent.

The present situation is, therefore, that neither the Washington treaty nor the Geneva protocol is now in force. Perhaps this is due to a growing conviction that each nation must be free to use in war any means of injuring its enemy which its military experts think effective. If so, we should expect few departures to be made by a generation which discovers almost yearly some new potential agency for waging war.

Another effort of the Washington Conference to deal with the law affecting the conduct of war, was its resolution creating a Commission of Jurists to consider and report upon two questions, as follows:[13]

[10] 3 U. S. Treaties and Conventions, p. 3116; Supplement to this JOURNAL, Vol. 16, p. 57.
[11] See League of Nations Document, C. 559, M. 201, 1927, II.
[12] See League of Nations Document, A. 13 (a), 1927, Annex.
[13] 3 U. S. Treaties and Conventions, p. 3139; Supplement to this JOURNAL, Vol. 16, p. 74.

(a) Do existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare?

(b) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations?

This commission met at The Hague in 1922 and 1923. The "new agency of warfare" primarily considered was the airship, but the commission dealt also with the use of radiotelegraphy in war. At the end of its thirty sessions, it had drawn up two sets of rules, sixty-two rules relating to aerial warfare, and twelve rules relating to the control of radio in time of war.[14] Its report is in many respects a model of the kind of the work which ought to precede international legislation. The resolution of the Washington Conference provided that the Powers represented on the commission should "confer as to the acceptance of the report and the course to be followed to secure the consideration of its recommendations by the other civilized Powers"; but five years have now passed and no conference has been held nor has any of the recommendations been embodied in international legislation.[15] While the report may serve as the basis for legislation at some future time, for the present this attempt must be pronounced abortive.

THE PROPOSED ABOLITION OF THE LAW OF NEUTRALITY

More significant perhaps is the effort of the past decade to achieve a fundamental reform in the international law relating to neutrality. What we have come to know as the law governing the rights and duties of neutrals found no place in the Grotian tradition of the seventeenth century. It was developed in the late years of the eighteenth century and during the nineteenth century, largely as a result of the use of naval power by a few nations and of the resistance to that use by a few other nations. The direction of the development was left to depend on chance circumstances and was largely controlled by the nations which had large armaments on the seas. Much of the law as we knew it in 1914 had been written by British prize courts in the interests of British commerce and British naval supremacy. Yet during the war it was assumed to have a sort of sanctity which rendered opprobrious any challenge of its validity, and President Wilson testified our loyalty to its rules as "sacred and indisputable."[16]

While the United States was neutral, many people in this country came to think that the interests of modern world society demanded a curb on war-

[14] For the general report of the Commission of Jurists, see Naval War College, International Law Documents, 1924, p. 96; and Supplement to this JOURNAL, Vol. 17, p. 242. For a valuable comment on the report, see James W. Garner, "Proposed Rules for the Regulation of Aerial Warfare," this JOURNAL, Vol. 18, p. 56.

[15] "While the Government of the United States proposed the conclusion of conventions for the adoption of the rules prepared by the Commission of Jurists, I understand that only one government has favorably responded." Charles E. Hughes, in Proceedings of the American Society of International Law, 1927, p. 4.

[16] James Brown Scott, President Wilson's Foreign Policy, p. 156.

making which this nineteenth-century law of neutrality not only did not furnish but actually negatived. If the action of a nation in going to war could be determined to be anti-social and in opposition to the interests of this world society, then duties should not be imposed on neutrals which would leave the prosecution of such an anti-social war free and unfettered. This feeling became so strong in the United States that President Wilson did not hesitate to commit himself to the thought that neutrality was a thing of the past: "No nation can any longer remain neutral as against any willful disturbance of the peace of the world." In his address recommending to Congress the declaration of war against Germany, he was not confining himself to the existing situation when he said: "Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its people, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances."[17] The clearest evidences exist that America's experience had convinced a large part of our public that our world society could not continue the nineteenth-century situation, in which a nation might find itself subjected at any time to a dislocation of its position in the world as a result of interference by states which, for any reasons or for no reasons which would appeal to others, might take up the attitude of belligerents.

An effort was made to move toward the abolition of the law of neutrality when the League of Nations Covenant was framed in 1919. The measures prescribed in Article 16, to be taken by each member of the League against a covenant-breaking state, cannot be fitted into the fabric of the nineteenth-century law. But the realization of a reform so far-reaching demands the coöperation of all states which are in a position to assert effectively the principles upon which that law is based. Eight years after the inauguration of the League of Nations, such coöperation has not yet been achieved. Two great Powers, the United States of America and the Union of Socialist Soviet Republics, by holding aloof, have kept alive for themselves the possibility of remaining neutral and of insisting on the old law of neutrality even in a war begun by a covenant-breaking state and condemned by the organized opinion of fifty-five peoples. Article 16 of the Covenant has therefore failed to accomplish the change in international law for which it was designed. The old law of neutrality still stands as a barrier to more effective organization to maintain the world's peace, and it now conditions the success of the steps which many peoples seem ready to take to protect our world society against aggression.

This became abundantly clear in the discussions of the Geneva protocol of 1924. That was an attempt to fill the gaps in the Covenant, and to abolish the law of neutrality more completely. It was sought to define more clearly

[17] James Brown Scott, President Wilson's Foreign Policy, p. 281.

the attitude to be taken by the organized community of nations toward a nation which might proceed to make war in disregard of the established processes for maintaining peace. But the British Government held up that effort, and British thought was in some degree influenced by the possibilities of a conflict with America.[18] If the United States should insist on maintaining the safeguards of a neutral's position under the nineteenth-century law of neutrality, Great Britain could not join with other nations against an aggressor without running the risk of possible American opposition. The same difficulties are being encountered in connection with other efforts to define and ban aggression, as we have recently seen in connection with Secretary Kellogg's proposal of a multipartite treaty for the renunciation of war. With part of the world seeking to retain the old legal distinctions between the status of a neutral and the status of a belligerent, it has proved all but impossible for the rest of the world to define satisfactorily the police action which might be undertaken to preserve the world's peace against pronounced aggression. He would be a bold person today who would repeat President Wilson's prophecy that the day of neutrals is past.

The same competition of ideas seems also to stand in the way of progress toward the clarification of the law of the sea in time of war. So long as the prevailing opinion in certain countries is seeking to establish a method of determining the fact of aggression and to create a consequent duty on all states to refrain from action which would have the effect of assisting its prosecution, and the prevailing opinion in other countries is seeking to maintain the freedom of each state to claim the benefits of the nineteenth-century law of neutrality in a war in which it is not a belligerent, it is obvious that little progress can be made toward a restatement of the law governing maritime warfare. While such divergent approaches are being made, the experience of the World War cannot afford us much basis for new legislation, such as that which was attempted in the Declaration of London in 1909. There has been but one effort in that direction since the war. The International Commission of Jurists, which was reconstituted by the Fifth International Conference of American States in 1923, and which met at Rio de Janeiro in 1927, prepared a project on the law of maritime neutrality.[19] This project was under consideration at the Sixth International Conference of American States in session at Havana; but as few of the states there represented have large maritime interests and as important maritime states in other parts of the world are not represented, it seems improbable that the project can be embodied in a treaty which would be accepted by many of the American states. Nor can we expect much result from discussions looking toward particular reforms in sea law in time of war. The recent proposal in

[18] See, for instance, The Round Table, Vol. XV, p. 58; P. J. Noel Baker, The Geneva Protocol, pp. 164 ff.

[19] The projects were published by the Pan American Union, in 1927. They are included in the Special Supplement to this JOURNAL, January, 1928.

England that the Declaration of Paris of 1856 should be denounced[20] has had some repercussion in the United States;[21] but there are no indications that an international consideration of such questions would now be fruitful. When the Advisory Committee of Jurists, meeting at The Hague in 1920, recommended a conference on international law to formulate and approve "the modifications and additions rendered necessary or advisable by the war,"[22] it took scant account of the actualities of our post-war situation.

CONCLUSIONS AS TO THE LAW OF WAR

On the whole, therefore, I think we can arrive at the following conclusions:

(1) While some of the practices of neutrals and belligerents during the World War may have established precedents for the future, the war itself contributed little or nothing to the solution of juridical problems, nor to the establishment of new principles in the law relating to war and neutrality.

(2) No progress has been made since the war toward restating, clarifying, or improving our international law concerning the conduct of war.

(3) The present divergence of opinion as to the future of the law of neutrality renders it difficult to foresee any fruitful attempts either to clear up the uncertainties which prevailed during the war, or to settle any of the controversies which arose, or to enact satisfactory legislation for the future.

If these conclusions are sound, I think we may say that Hall's prophecy of 1889 has not been fulfilled, and that most of our own national expectations as to the future of international law, entertained while the war was in progress, have been disappointed. In short, it seems that victory in war cannot be relied upon to bring an improvement of the law relating to war.

PROGRESS OF THE LAW OF PEACE

Let us now inquire as to the progress made since 1918 in the development of the law which governs international relations in time of peace. The story here may be more encouraging and the outlook more promising. If our expectations for the development of this part of international law were not so insistent a decade ago, many of us did look forward to the establishment of a new political order which would furnish the background for the growth of a new legal order as well. The war had brought an appreciation of the interdependence of peoples, which some of us were confident would continue and would enable progress to be made toward meeting more amply the needs of our international community. At the high tide of war-enthusiasm in the

[20] See The New York Times, November 11, 1927, p. 1.

[21] See The New Republic, December 14, 1927, p. 86.

[22] Records of the First Assembly of the League of Nations, Meetings of Committees, I, p. 422.

United States, men were to be found who believed even that mankind was in the act of accomplishing its own regeneration, and that as a result a new era was about to dawn in which a spirit of neighborliness was to dominate the conduct of international affairs.[23] If such anticipations were doomed to disillusionment in the course of the difficult process of making peace, they may, nevertheless, have left some trace in the international régime of this post-war period.

INTERNATIONAL LEGISLATION BEFORE THE WAR

The outstanding need of international law before the war was the creation of methods and agencies for its legislative development. The Grotian tradition which had come down from the seventeenth century may have been at one time a sound enough basis for a juristic system. But it was moulded before any of the great changes in our international society which were made in the course of nineteenth century. Between 1825 and 1850, the world saw revolutionary developments quite as significant as those which our own generation has witnessed since 1900. The introduction of machine industry and the beginning of steam transportation meant as much in that time, if not more, than the development of radiotelegraphy and the universalization of motor transport have meant in our own day.[24] The unfolding of the nineteenth century saw, therefore, the growth of an international community very different from that upon which the century had dawned. The relations of states were changed, new problems became common, contacts among peoples became more intimate. The established legal traditions no longer sufficed. The old law did not fit, and new law had to be made. But the machinery for making it was not at hand, and the methods had not been proved. World society was organized in separate and independent communities, united but loosely in what hardly deserved the name of an international community.

It was soon after the middle of the last century that this situation began to be remedied by international coöperative effort. The Western nations began to send their representatives to conferences to discuss their common problems. Previously, multipartite treaties had resulted only from conferences on acute political problems, held usually at the conclusion of some war. But many conferences during the latter half of the nineteenth century framed multipartite treaties to deal with the problems of continuing peace. In 1862, the Government of the United States suggested that various nations should send representatives to a conference to deal with their common problem of postal communications. In 1865, the first multipartite international telegraph convention was signed. In 1872, David Dudley Field published his prophetic draft of outlines of an International Code, proposing the creation of both a series of annual conferences and a "high tribunal of arbitration." In the following year, two private organizations were formed

[23] See, for example, Elihu Root, Men and Policies, p. 209.

[24] See Manley O. Hudson, Current International Coöperation, pp. 1–29 (1927).

which have since greatly stimulated governmental effort; the *Institut de Droit International* was founded at Ghent and the International Law Association was organized at Brussels. In 1874, various governments joined in forming the Universal Postal Union, which in a half-century has become a universal league of nations. In 1875, an international union was formed which in fifty years has given us a world language of weights and measures.

In other words, the quarter of a century between 1850 and 1875, saw the launching of an attempt to deal with the needs of the new world society by means of international conferences engaged in legislative activities, the results of which were embodied in multipartite international conventions. Such conferences became increasingly frequent before 1914, and their legislation was embodied in numerous instruments.[25] (See Appendix, Supplement, p.90.) They effected a big extension of our international legal order, and filled some of the gaps in our customary law. Yet down into this century their product was all but ignored in the conventional treatises on international law.[26]

The development of this process of legislation before the war left much to be desired. With so little continuity of effort, the development was spasmodic. It was frequently difficult to assemble a conference. No agencies existed to organize the preparatory work necessary to success when it was assembled, nor to effect any oversight of the execution of its decisions after it had adjourned. The state which took the initiative of calling a conference was not infrequently the object of other states' suspicions. Many needs did not receive attention because of irrelevant political conditions. In some fields, such as the law of international rivers, legislation had to be the by-product of conferences assembled for other purposes. International authority was lacking, and when a conference adjourned its re-convening was always a matter of doubt. This is well illustrated in the history of the peace conferences at The Hague. The measure of success which was achieved by the first conference in 1899 engendered hopes that a second conference might be held. In 1904, President Roosevelt took initiative to this end; but the second conference did not meet until 1907. The Final Act of the 1907 Conference contained a recommendation for "the assembly of a Third Peace Conference" in 1915.[27] But before the war in 1914, when the prospect for a third conference was very dim, the Government of the United States suggest-

[25] An excellent list of such instruments is to be found in the Catalogue of Treaties, 1814–1918, published by the U. S. Department of State in 1919, pp. 703–706. Of the 152 instruments included in that list, but 15 antedate 1876. See also, F. S. Dunn, "International Legislation," 42 Political Science Quarterly, p. 571. For a list of permanent international organizations, see League of Nations Handbook of International Organizations, Geneva, 1926. On the place of the new legislation in international law, *see* Manley O. Hudson, "The Prospect for International Law in the Twentieth Century," 10 Cornell Law Quarterly, 419; L. Oppenheim, The Future of International Law (1921).

[26] See, for example, Hall, International Law (8th ed. by A. Pearce Higgins, 1924).

[27] James Brown Scott, Hague Conventions and Declarations of 1899 and 1907, p. 29.

ed that it be postponed to 1916.[28] In other words, the pre-war world lacked a habit and tradition of international conference, and this partly explains its shortcoming in the systematic development of international law.

INTERNATIONAL LEGISLATION SINCE THE WAR

Since 1918, a great gain has been made in this respect. The Peace Conference at Paris made some notable additions to international law, in legislative treaties not primarily a part of the peace settlements.[29] But its chief contribution was the establishment of the system of conference and cooperation which we know as the League of Nations. In eight years, eight general international conferences, known as the Assembly of the League of Nations, have been held in Geneva, and a smaller conference, known as the Council of the League of Nations, has met forty-eight times. Whereas before the war it was extremely difficult to assemble a Hague Conference once in eight years, the assembling of a more general conference of the Powers has now become a fixture for the first Monday in each September; and the smaller conference meets regularly during every third month. With these two series of conferences firmly established, the world has attained a continuity in international affairs, it has developed a systematic approach to problems of international legislation, and it has established a permanent civil service for effectuating the method of conference. In some measure, the needs so sorely felt before the war have been met, and methods and agencies are now at hand for dealing with new needs as they arise. The result has been that the past eight years have seen a great quickening of the legislative process in international affairs. Special conferences have been much more frequent, and the number of multipartite treaties has ncreased rapidly. No previous period in the world's history has made such a large addition to international law. We seem now to be developing a habit and a tradition of conference which will serve the needs of future legislation.

An enumeration of some of the multipartite conventions or treaties which have resulted from international legislation by conferences held under the auspices of the League of Nations, will indicate the extent of the post-war additions to international law.

1. *International Labor Conventions.* Before the war, an international conference held at Berne in 1906 had promulgated two international labor conventions, one concerning the night work of women and one concerning the manufacture of matches with white phosphorus. In 1913, a second conference at Berne had elaborated a draft convention on the night work of

[28] U. S. Foreign Relations, 1914, p. 10.

[29] The more important were the Convention on Aerial Navigation, October 13, 1919; the Convention on Liquor Traffic in Africa, September 10, 1919; the Convention on Traffic in Arms and Ammunition, September 10, 1919; and the Convention revising the General Act of Berlin, and the General Act and Declaration of Brussels, September 10, 1919. See 3 U. S. Treaties and Conventions, p. 3739 ff.

children, but it was never signed. In eight years since the war, ten international labor conferences have been held, and have promulgated twenty-five labor conventions. Some of these conventions have been ratified by as many as twenty-one states, others by a smaller number.[30] On January 1, 1928, a total of 242 ratifications of the labor conventions had been registered with the Secretariat of the League of Nations, and twenty-nine states had ratified one or more of them. Many states have adapted their legislation to conform to conventions which they have not ratified. In a special sense, this annual International Labor Conference has become a world legislature for dealing with international labor problems.

2. *Communications and Transit.* The Assembly and Council of the League of Nations have created a special organization for dealing with problems relating to communications and transit. Three general international conferences have been held, and have promulgated eight multipartite conventions.[31] On February 1, 1928, the Convention and Statute on Freedom of Transit[32] had been ratified or adhered to by twenty-six states, and the Declaration recognizing the right to a flag of a state having no seacoast[33] had been ratified by twenty-two states.

3. *Traffic in Women and Children.* The suppression of the white slave traffic had been the object of legislation before the war, in an agreement of 1904 and in a convention of 1910. On September 30, 1921, as a result of the work of a special diplomatic conference held in Geneva, a new convention was signed which by February 1, 1928, had been ratified or adhered to by thirty-three states.[34]

4. *Traffic in Obscene Publications.* This subject had been regulated before the war by an agreement of 1910. In 1923, a conference was held in Geneva to revise this legislation and bring it up to date, and it resulted in the promulgation of a new convention[35] which has been signed by some forty-three states, more than a majority of which have ratified it.

5. *Traffic in Opium.* The ratification of the International Opium Con-

[30] Twenty of the twenty-five conventions have been brought into force for certain states. A chart showing the action of the governments with reference to the Labor Conventions is published each month, as a supplement to Industrial and Labour Information, published by the International Labour Office, Geneva. See also, Morellet, "At What Moment Do The International Labour Conventions Become Applicable," 16 International Labour Review, p. 755.

[31] See League of Nations Official Journal, November, 1927, pp. 1501–1545. An annex to the annual supplementary report on the work of the Council and Secretariat of the League of Nations indicates the progress of ratifications of these various multipartite treaties. See League of Nations Documents, A. 7(a), 1925, Annex; A. 6(a), 1926, Annex; A. 13(a), 1927, Annex.

[32] For the texts, see 7 League of Nations Treaty Series, p. 12; Supplement to this JOURNAL, Vol. 18, p. 118.

[33] 7 League of Nations Treaty Series, p. 74; Supplement to this JOURNAL, Vol. 18, p. 167.

[34] 9 League of Nations Treaty Series, p. 415; Supplement to this JOURNAL, Vol. 18, p. 130.

[35] 27 League of Nations Treaty Series, p. 213; Supplement to this JOURNAL, Vol. 20, p. 178.

vention of 1912 had encountered many snags before the war. No international agencies then existed to smoothe them out. The convention received eighteen ratifications prior to 1918. Since that time, seventeen states have ratified it by virtue of their ratification of the Treaty of Versailles or some other of the treaties of peace, and sixteen states have ratified it in consequence of the efforts of the organs of the League of Nations. The convention was in force on September 1, 1927, for some fifty states. Two new treaties on the subject have resulted from efforts made through the League of Nations; an agreement of February 11, 1925,[36] has been signed by seven states, of which six have ratified, and a convention of February 19, 1925,[37] has been signed by thirty-four states of which some twenty-five have ratified.

6. *Traffic in Arms.* The General Act for the Repression of the African Slave Trade, signed at the Brussels Conference in 1890, contained various provisions concerning the international trade in arms and ammunition. At the Paris Peace Conference an attempt was made to bring these provisions up to date, and a separate convention was signed at St. Germain in 1919.[38] It was largely due to the failure of the United States to ratify this convention that it never achieved its object. In 1925, after the subject had been much discussed at conferences in Geneva, a diplomatic conference was held which promulgated a new convention for the supervision of the international trade in arms and ammunition and in implements of war.[39] This convention has been signed by no fewer than thirty-five states, including the United States; but only four states have ratified or adhered to it. Without ratification by the United States, it seems improbable that the convention will ever be widely in force.

7. *Prohibition of Gas Warfare.* The protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, opened at Geneva on June 17, 1925,[39] has been signed by thirty-eight states including the United States and Turkey; but only France and Venezuela has ratified it and the Union of Socialist Soviet Republics has recently adhered to it.

8. *Slavery.* The slave trade has been the subject of frequent international legislation in times past, the Brussels Act of 1890 being the outstanding accomplishment. On September 25, 1926, without a special diplomatic conference, the Seventh Assembly of the League of Nations opened to signature a new slavery convention[40] which has now been signed by not

[36] League of Nations Document, C. 82, M. 41, 1925, XI.

[37] *Ibid.*, C. 88, M. 44, 1925, XI.

[38] 7 League of Nations Treaty Series, p. 332; Supplement to this JOURNAL, Vol. 15, p. 297.

[39] League of Nations Document, C. 559, M. 201, 1927, II. For a comment, see Dupriez, "*Le controle des Armes et Munitions et des Matériels de Guerre*," 7 *Revue de Droit International et de Législation Comparée*, p. 57.

[40] League of Nations Document C. 586, M. 223, 1926, VI; Supplement to this JOURNAL, Vol. 21, p. 171. See an excellent commentary by A. L. Warnshuis, Joseph P. Chamberlain

fewer than thirty-six states, and ratified or adhered to by twenty-two states.

9. *Commercial Arbitration.* In 1923, after long consideration by various committees, a protocol on arbitration clauses in private contracts was opened for signature at Geneva.[41] It has received twenty-eight signatures, and fifteen ratifications. A supplementary protocol on the same subject was recently promulgated by the Eighth Assembly of the League of Nations.[42]

10. *Customs Formalities.* In 1923, a diplomatic conference at Geneva opened for signature a convention relating to the simplification of customs formalities,[43] which has now received not fewer than thirty-seven signatures, twenty-six ratifications and one adhesion.

11. *International Relief Union.* In 1927, a diplomatic conference meeting in Geneva adopted a convention and statute for the creation of an International Relief Union.[44] The convention has not yet been closed to signature, but in the few months since its promulgation, it has been signed on behalf of seventeen countries.

12. *Import and Export Restrictions.* A very recent diplomatic conference at Geneva promulgated, on November 8, 1927, a convention for the abolition of import and export prohibitions and restrictions,[45] which twenty-six states have signed immediately and which remains open for signature until January 1, 1929.

Here, then, is a record of forty-four multipartite conventions, drawn up during the past decade as a result of the use of the new legislative agencies provided by the League of Nations. The list does not include various international instruments of a special and in some cases administrative character; it excludes among others the Protocol and Statute of the Permanent Court of International Justice,[46] the convention relating to the non-fortification and neutralization of the Aaland Islands,[47] the arrangement with regard to the issue of certificates of identity to Russian refugees,[48] the protocol and declaration relating to the settlement of refugees in Greece,[49] and the protocols

---

and Quincy Wright in International Conciliation, No. 236 (January, 1928). For the reasons why the United States failed to ratify the convention of 1919, see this JOURNAL, Vol. 20, p. 151.

[41] 27 League of Nations Treaty Series, p. 157; Supplement to this JOURNAL, Vol. 20, p. 194.

[42] League of Nations Official Journal, Spec. Supp. No. 53, p. 16.

[43] 30 League of Nations Treaty Series, p. 371. On the measures taken by various governments to give effect to the provisions of this convention, see League of Nations Official Journal, 1926, pp. 831–844; 1927, pp. 636–651, 1614–1631; and League of Nations Document, C. 354, M. 127, 1927, II.

[44] League of Nations Document, C. 364, M. 137, 1927, V.

[45] League of Nations Document, C. 559, M. 201, 1927, II. This convention was signed on behalf of the United States on January 30, 1928.

[46] Publications of the Court, Series D, No. 1; Supplement to this JOURNAL, Vol. 17, pp. 55 and 57.

[47] 9 League of Nations Treaty Series, p. 212.

[48] 13 *Ibid.*, p. 238.

[49] 19 League of Nations Official Journal, p. 1506.

relating to the financial restoration of Austria.[50] It represents an astonishing advance in the extension of international law. The treaties do not constitute legislation in the sense in which that term is used in municipal law. They are not binding on states which do not agree to be bound. But as acts of deliberate law-making they are in a real sense international legislation, and their conclusion indicates the process by which the extension of international law in accordance with the needs of our time is being accomplished. A process begun before the war has been thus extensively developed as a result of the firmer establishment of permanent international institutions.

Meanwhile, of course, the legislative process has been continued by agencies which are not a part of the League of Nations. Pre-war multipartite conventions have found a wider acceptance, and in some instances have been revised and brought up to date; while conventions have been entered into relating to subjects not previously covered. Outstanding examples are the following:[51] a new law has been made for the Universal Postal Union in seven instruments signed at Madrid in 1920, and amended at Stockholm in 1924;[52] a convention of 1921 has modified the law of the Union of Weights and Measures;[53] a new agreement on the protection of industrial property was drawn at The Hague in 1925, revising the convention of 1883;[54] a convention of 1920 established an International Institute of Refrigeration;[55] a convention of 1924 created an international epizoötic office;[56] the radiotelegraph convention of 1912 has recently been revised in the convention signed at Washington on November 25, 1927, by representatives of seventy-four separate, though not all independent, governments.

The process of international legislation has also been continued in the series of International Conferences of American States. The first conference meeting at Washington in 1889–90, adopted various recommendations but promulgated no treaties or conventions; the second conference at Mexico in 1901–2, promulgated four treaties and six conventions, none of which received more than nine ratifications at the hands of the twenty-one republics; the third conference at Rio de Janeiro in 1906, promulgated four conventions, one of which, that creating an international commission of jurists, was ratified by fifteen states, two others being ratified by nine states; the fourth conference at Buenos Ayres in 1910, also promulgated four conventions, of which a convention on the protection of trade marks received

[50] 12 League of Nations Treaty Series, p. 413.

[51] For lists of recent conventions, see League of Nations Treaty Series, General Index No. 1, p. 530; the British Year Book of International Law, 1925, p. 264; 1926, p. 277; 1927, p. 245.

[52] See 45 and 46 League of Nations Treaty Series. See also Sly, "The Genesis of the Universal Postal Union," International Conciliation, No. 233 (October, 1927).

[53] 17 League of Nations Treaty Series, p. 46.

[54] La Propriété Industrielle, 1925, p. 221.

[55] 8 League of Nations Treaty Series, p. 65. [56] 57 *Ibid.*, p. 135.

fourteen ratifications; the fifth conference meeting at Santiago in 1923, promulgated four conventions, of which at least three have come into force.[57] It may be observed, however, that not all of these conventions resulting from the work of the International Conferences of American States, are legislative acts in the sense in which that term is being used here.

Another fruitful agency whose labors have resulted in international legislation in recent years is the *Comité Maritime International*. This is not an official body, but its work forms the basis of the deliberations of diplomatic conferences held at Brussels from time to time for the adoption of international legislation relating to the maritime law of peace. The sixth of these conferences was held in 1926. Their recent labors have produced four important conventions, relating to the limitation of shipowners' liability, bills of lading, maritime liens and mortgages, and immunities of state-owned ships.[58] We should mention, also, in this connection the series of conferences on private international law, of which a fifth conference was held in 1926,[59] and a sixth conference met at The Hague last month.

These various efforts have made the last decade notable in the history of international law as a period of unparalleled legislative activity. (See Appendix, Supplement, p. 101.) No previous decade has seen our law of nations carried into so many new fields, none has known such frequent conferences, none has made a larger contribution to the method by which legislative adaptation can be effected. And there is now every indication that this process will continue. No one can predict that it will not be interrupted by war; no one can allow himself to think that a final stage has been reached with respect to any topic; no one can foresee that better methods will not be evolved. The progress has not been due altogether to the work of lawyers, for the legislators have been drawn from many professions. But lawyers have borne a large share of the responsibility, and I think the legal profession of our generation can feel that its efforts have not been sterile, and that its opportunities have not been wasted.

DEVELOPMENT OF THE JUDICIAL PROCESS

Great progress is to be noted also in the judicial development of international law. The post-war settlements called for the creation of numerous international tribunals which have functioned during the past decade in such a way as to furnish our profession with a large store of new precedents and

[57] See the Report of the Delegates of the United States of America to the Fifth International Conference of American States, Washington, 1924; also the Special Handbook for the use of the Delegates at the Sixth Conference, published by the Pan American Union in 1927; and Supplement to this JOURNAL, Vol. 21, pp. 92–113.

[58] See Franck, "A New Law for the Seas," 42 Law Quarterly Review, pp. 25, 308; G. van Slooten, "*La Convention de Bruxelles sur le Statut Juridique des Navires d'État*," 7 *Revue de Droit International et de Législation Comparée* (3d ser.), p. 453.

[59] See Kosters, "*La Cinquième Conference de Droit International Privé*," 7 *Revue de Droit International et de Législation Comparée* (3d ser.), pp. 156, 245.

principles. But more striking contributions have been made by the Permanent Court of International Justice. The establishment of that world tribunal represented the triumph of a whole generation of effort, and it may come in time to be counted the most significant part of our generation's service to international law. In six years, the court has handed down eleven judgments, fourteen advisory opinions, and four important orders.[60] Some principles have been developed, chiefly in regard to the interpretation of treaties, and others have been applied in such a way as to constitute valuable guides for the future. The recent judgment in the *Lotus Case*[61] makes a distinct clarification of the law as to jurisdiction. In spite of the provision in Article 59 of its Statute—that "the decision of the Court has no binding force except between the parties and in respect of that particular case"—the output of the court to date possesses a large degree of continuity and system, and Article 59 cannot be taken to have negatived an application of our Anglo-American doctrine of *stare decisis*.

But more important than the actual judicial work which the court has been called upon to do in six years, is the position which it has attained in the world of international affairs, and the progress it has made in developing the international judicial process. The frequency of resort to it is clear evidence of the confidence which it has inspired. It is a convincing fact, also, that jurisdiction is now conferred on the court by not less than two hundred international treaties or other instruments by which states in large number have agreed to give it a kind of compulsory jurisdiction. A habit now seems to have grown up which leads to a responsible consideration of the possibility of using the court whenever international difficulties arise. The confidence is due in part to the personal integrity and learning of the judges, in part to the common sense upon which their action to date has been based, and in no small part to the vision which they have shown in the methods they have adopted. The road to judicial participation in international life no longer remains unexplored; it is paved with careful rules of procedure and hedged with cautiously developed precedents. The record of the court in six years not only exceeds what most of us in the profession would have been willing to predict a decade ago, but it seems now to warrant a firm belief that new foundations have been laid which the future will be unwilling to destroy.

In view of our Anglo-American legal history, it might have been expected that greater reliance would now be placed upon this judicial development of international law, with its progressive "narrowing down from precedent to precedent," than upon any attempt at formulated enactment. Something seems to be at work in the spirit of our times, however, which has made many people in America unwilling to follow the method by which our own United States Supreme Court has won its dominant position in the law of this country.

[60] See Manley O. Hudson, "The Sixth Year of the Permanent Court of International Justice," this JOURNAL, Vol. 22, p. 1.

[61] Publications of the Court, Series A, No. 12.

Seven years have passed since the court was created, and in this period the United States has lent nothing of her influence to its maintenance. We seem to fear a progressive development of international case law by the very methods which have given us our national case law. In some quarters opinion is still attached to "codification" as a more promising avenue to explore. To those who seek a development of law which will once and for all dispose of perplexing difficulties, who lack faith in institutions as the framework upon which succeeding generations must build, neither the legislative process of dealing with one need at a time nor the judicial process of dealing with one case at a time will suffice. Nothing short of a code of international law will satisfy.

PROSPECT FOR CODIFICATION

The past decade has witnessed a considerable progress of efforts looking toward a codification of international law. Though the word "codification" has caught a popular fancy during this period, it expresses but crudely the ideas which are current in the profession. A half-century ago, David Dudley Field, in drafting his outlines of an international code, conceived of a global, all-embracing instrument which would serve as a chart for the conduct of international relations. Few if any discriminating lawyers have such a conception today. The term codification is more commonly used, instead, to describe a process of restating various parts of the law in terms of present needs and understanding, and definite proposals are usually limited to progressive attempts at such restatement.

Two such efforts are now under way.[62] The International Commission of Jurists, first agreed upon in 1902, but created by the convention drawn up at the third International Conference of American States in 1906, finally met at Rio de Janeiro in 1912. But its work was hardly begun before it was interrupted by the war. The commission was reconstituted by the Santiago Conference in 1923, and when it met for the second time at Rio de Janeiro in 1927, it had before it thirty projects of restatement prepared by the unofficial American Institute of International Law. It was found possible to agree upon twelve drafts, on as many topics of public international law, and a single draft on private international law, for the purpose of placing them before the conference which is now meeting in Havana. The commission also adopted a resolution calling for a continuance of its mandate, and it is possible that a decision to that effect is now on the point of being taken. This effort throughout has been designed to produce a codification of *American* international law, and the measure of its success has been conditioned upon doubts as to the utility of that limitation.

A second movement which now seems to hold greater promise is due to

[62] See Manley O. Hudson, "The Progressive Codification of International Law," this JOURNAL, Vol. 20, p. 655; James Brown Scott, "The Gradual and Progressive Codification of International Law," this JOURNAL, Vol. 21, p. 417.

efforts made in the League of Nations. In 1920, when Germany had not yet been permitted to resume her rôle in international coöperation, when Russia held aloof, and when the Government of the United States was finding it impossible to take an active part in general international activities, the first Assembly of the League of Nations did not follow the recommendation looking toward a codification conference, made by the Committee of Jurists set up to draft the Statute of the Permanent Court of International Justice. That recommendation, as has been pointed out, envisaged chiefly a reëstablishment of the rules affected by the war, and a formulation of changes dictated by experience during the war. For such a task, the conditions of the times were clearly inopportune. But with the approach to more normal conditions, the Fifth Assembly of the League of Nations in 1924 set up a committee of experts to explore the possibilities and to list those subjects of international law "the regulation of which by international agreement would seem to be most desirable and realizable."[63] In 1927, after due deliberation and consultation with the governments of all states, this committee reported five subjects as being "sufficiently ripe" for consideration at an international conference. Three of these subjects[64]—territorial waters, nationality, and responsibility of states in respect of injury caused in their territory to the person or property of foreigners—were selected by the Eighth Assembly of the League of Nations to be considered at a First Codification Conference, now envisaged for 1929, and a small committee met at Geneva a few days ago and began the preparations for that conference.[65] The choice of The Hague as the meeting-place of the conference was explained by M. Politis, the *rapporteur*, as a demonstration of "the continuity of the effort to invest international law with a little more precision and stability." The Eighth Assembly of the League of Nations expressed the opinion that codification should not be confined "to the mere registration of the existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life," and that some system should be organized for "the subsequent revision of the agreements entered into."[66] It is too early to predict what may be the result of this effort; but it would seem clear that if the conference now in prospect should prove successful, a process of codification may be inaugurated which if continued for a quarter of a century will mean a vast improvement in international law.

[63] Records of the Fifth Assembly, Plenary Meetings, p. 125.

[64] Concerning the subjects selected, the Government of the United States expressed the view, in reply to one of the committee's questionnaires, that "international arrangements . . . would serve a useful purpose and would therefore be desirable, and that there would be no insuperable obstacles to the concluding of agreements on these general subjects." See League of Nations Document, C. 196, M. 70. 1927. V, p. 160.

[65] *See* League of Nations Document, C. 44. M. 21. 1928. V.

[66] The material relating to the Conference set for 1929 has been collected in League of Nations Document, C. 548, M. 196, 1927, V.

CONCLUSIONS AS TO THE LAW OF PEACE

This record of the past decade in international legislation, in the establishment of the judicial process, and in preparation for restating our law in terms of the contemporary needs of world society, seems to justify the following conclusions:

1. The war gave a great impetus to the development of the law of peace by creating a willingness among various peoples to set up and maintain institutions which facilitate systematic and continuous effort to that end.
2. The numerous multipartite treaties brought into force during the past ten years represent a process of international legislation which had already been begun before the war and which has now been so advanced as to warrant a hope that the future law of nations will meet more adequately the needs of our international community.
3. The judgments and opinions of the Permanent Court of International Justice give assurance of the growing use of the judicial process in the moulding of international law.
4. The prospective inauguration of a process of restatement of international law, to be called codification, may open new opportunities for its renovation and greatly enrich the product of the decades to come.

If these conclusions do not seem too sanguine, the legal profession of this generation may feel that in spite of its failure to realize the expectations entertained during the war, its energies are being employed in useful effort. We may have lost some of our opportunities, we may still cherish an outworn philosophy, and we may have much to do in the decades that lie ahead. But the profession has not allowed itself to be satisfied with homage to the Grotian tradition, it has not confined its activities to a mere lengthening and broadening of eighteenth century principles, it has not astigmatized its vision by refusing to take account of the changes wrought in world society. Significant departures have been taken during the past ten years, and the ground is prepared for departures to be more easily taken in the future.

Due to its development since the war, international law rests today on a firmer foundation than when this decade began, and it promises to wear a very different appearance a quarter of a century hence.

EDITORIAL COMMENT

THE SIXTH PAN AMERICAN CONFERENCE

The Sixth of the International Conferences of American States belongs to history as this number of the JOURNAL goes to press. The conference opened in Habana on the 16th of January and closed on February 20th. Belonging to history, it will be for the future to determine its place in the series of inter-American gatherings. Outwardly it differs from its predecessors in three ways: first, a President of an American Republic other than that in which the conference was held graced its opening session; second, the representatives of the twenty-one American Republics were represented by their official delegates, took part in the proceedings and signed its Final Act containing the conventions and resolutions adopted during the session; third, representatives of American women seeking to bring about equal rights in each of the twenty-one Republics were present and presented their case, if not in a regular, at least in an extraordinary session of the conference.

The foreign president was Calvin Coolidge, President of the United States. To show the importance of the conference, at least in the opinion of his administration, he left Washington on January 13, arriving in Key West on the morning of the 15th, and in the harbor of Habana, aboard the S. S. *Texas*, in the afternoon of the same day, amid the plaudits of an immense throng of the good people of Cuba, who had gathered to do him honor. At three o'clock of the afternoon of the 17th, President Coolidge delivered his address at the conference. It was thus the first time that an American citizen while President of the United States had put his foot upon the soil of a foreign American Republic, and it was the first time that an American President had addressed an American audience other than in these United States of America.

It was natural that President Coolidge should speak of the discovery of America, and the interest which the Americans of our day still have in its discovery; but to few, if any, has it been given to express the common heritage in such an uncommon manner. It was natural also that President Coolidge should address himself especially to the people of Cuba, and no one could have done it in more generous and gracious terms. Finally, it was natural that President Coolidge should indulge in observations of a general kind, addressed in general terms to the larger audiences in the American Republics beyond the reach of his voice; and no one could have been happier than he in his choice of message to his invisible audience.

Here are his opening words:

> No citizens of any of the Americas could come to the queen of the islands of the West Indies without experiencing an emotion of gratitude

> and reverence. These are the outposts of the new civilization of the Western Hemisphere. It was among them that the three small ships of the heroic admiral came when, with the assistance and support of Spain, Columbus presented to Europe the first widespread, public and authoritative knowledge of the New World. . . .
>
> The great discoverer brought with him the seed of more republics, the promise of greater human freedom, than ever crossed the seas on any other voyage. With him sailed immortal declarations of independence and great charters of self-government. He laid out a course that led from despotism to democracy. . . .
>
> In the spirit of Christopher Columbus all of the Americas have an eternal bond of unity, a common heritage bequeathed to us alone. Unless we together redeem the promise which his voyage held for humanity, it must remain forever void. This is the destiny which Pan America has been chosen to fulfil.

This was President Coolidge's way of stating a common origin, a common heritage, and a common destiny.

Addressing himself to Cuba, he said:

> The very place where we are meeting is a complete demonstration of the progress we are making. Thirty years ago Cuba ranked as a foreign possession, torn by revolution and devastated by hostile forces. Such government as existed rested on military force.
>
> Today Cuba is her own sovereign.

What a President of the United States had solemnly proclaimed in Washington in 1898, that Cuba was to be free, sovereign and independent, a President of the United States had solemnly confirmed in Habana in 1928.

Finally, the message to the Americans:

> Our most sacred trust has been, and is, the establishment and expansion of the spirit of democracy. . . . But we have put our confidence in the ultimate wisdom of the people. . . . We are thoroughly committed to the principle that they are better fitted to govern themselves than anyone else is to govern them. . . . It is better for the people to make their own mistakes than to have some one else make their mistakes for them.
>
> . . . The surest refuge of the weak and the oppressed is in the law. It is preëminently the shield of small nations. . . .
>
> In the international system which you represent the rights of each nation carry with them corresponding obligations, defined by laws which we recognize as binding upon all of us. It is through the careful observance of those laws which define our rights and impose our duties that international coöperation is possible. . . . Without the application of these there can be no peace and no progress, no liberty and no republic. . . .
>
> The light which Columbus followed has not failed. The courage that carried him on still lives. They are the heritage of the people of Bolívar and of Washington. We must lay our voyage of exploration toward complete understanding and friendship.

The session which President Coolidge attended was a special session, and only one beside him, the President of Cuba, spoke, welcoming "the illustrious

person of his excellency, Calvin Coolidge, Chief Executive of the greatest of all democracies."

Two days later, on January 18th, the ordinary or formal opening of the conference took place, under the presidency of Sr. R. Martinez-Ortiz, Secretary of State of Cuba. After his address of welcome, Dr. Antonio Sanchez de Bustamante y Sirvén, Cuba's most distinguished publicist and held in equal regard in all the Americas, was proclaimed president. After his address, excellent in form and convincing in substance, Sr. Alejandro Lira, of Chile, representing, as is the custom, the country in which the preceding conference had met, delivered an admirable address, in which he properly claimed the Pan American Conferences as the precedent of those larger and all-embracing which were shortly to convene at The Hague.

On February 20th, ending, as it had begun, on a Monday, the conference was solemnly adjourned. The Secretary of State, Sr. Ortiz, presided and delivered an address. Mr. Bustamante, president of the conference, delivered an address. He was followed by Mr. Varela, Minister of Uruguay to Washington and chairman of the Uruguayan delegation, who, according to custom, expressed the appreciation of his country as the place of meeting of the succeeding conference of the American Republics. The Argentine Minister to Cuba, Sr. Laurentino Olascoaga, who had succeeded Dr. Pueyrredon as president of the Argentine delegation, presented the appreciation of the countries represented, especially his own, to the Government of Cuba. He was followed by Sr. Silva Vildósola, delegate of Chile, who voiced appreciation of the press, and by Mr. Hughes, chairman of the American delegation, who expressed appreciation of the indispensable services of the Secretary General and of the members of his staff, whereupon, the Secretary of State, congratulating the conference upon its success, declared its adjournment.

Between the two Mondays, January 16th and February 20th, the conference began and completed its labors upon which its claim to remembrance must be based.

The Governing Board of the Pan American Union, composed of the diplomatic representatives of the American Republics to Washington, prepared in advance the program of the conference. It consisted of a number of topics which were referred to the eight commissions into which the conference was divided upon its opening:

No. 1. Pan American Union
No. 2. Public International Law and Frontier Police
No. 3. Private International Law and Legislative Uniformity
No. 4. Communications
No. 5. Intellectual Coöperation
No. 6. Economic Problems
No. 7. Social Problems
No. 8. Treaties, Conventions and Resolutions

In addition, there was what might be called a Directing Committee, or a Committee of the Whole, or, as it was called, a Committee on Initiative, composed of the chairman of each of the twenty-one delegations of the conference.

It was understood that each delegation was to be represented in each of the eight committees, at least by one member, or several if it chose, on condition that each delegation should have but a single vote. This was proper, as the legal equality of each of the republics required that there should be an equality of representation in the committee so far as voting was concerned. The extent to which equality pervaded the conference is perhaps best seen in what was, after all, a trifling matter. It is the rule that the chairman of the delegation of the country in which the conference meets shall be its president. It is also the rule that each country shall have a vice-president. In order that no country shall have a claim of right, or seem to have precedence over the others, the names of the countries are placed in an urn and drawn one by one, by the Secretary General. The order in which they are drawn determines the order of the vice-presidents. The slip containing the name of Peru was first drawn; the United States was No. 20, and Cuba last of all. If precedence entered into the matter, the United States would have been the last of all, inasmuch as Cuba had the presidency.

The Secretary General was appointed by the Government of Cuba. He was, of course, a Cuban, Sr. Néstor Carbonell, and a very competent one.

Commission No. 1 on the Pan American Union

For some years there has been a feeling that greater prestige and stability should be given to the Pan American Union, that it should owe its existence to a convention drafted by the conference and ratified as a treaty by each of the American Republics, instead of a resolution of the conference.

A project of convention was therefore, in accordance with a resolution of the fifth Conference, presented by the Governing Board of the Pan American Union and adopted in the last days of the session. The Pan American Union was not to be a political body. It was to be a Union of the Republics for general purposes of an intellectual and cultural nature. It was, therefore, expressly decided that it should not be political, and it is so denominated in the bond. No state was to dominate, and that it might be clear beyond peradventure, it was proposed that the chairman should not be elected or serve for more than a year, but was to serve according to the alphabetical order of the republics. This proposal was, however, defeated, so that the chairman and vice chairman are to be elected annually.

There was in some quarters a feeling that the diplomatic representatives of the American Republics in Washington would not be as free as "undiplomatic" persons appointed for the special purpose. In the end the resolution took the following form:

> The Government of the Pan American Union shall be vested in a Governing Board composed of the representatives that the American Governments may appoint. The appointment may devolve upon the diplomatic representatives of the respective countries at Washington.
>
> Besides his own country, a member of the Governing Board may serve as special representative of one or more countries, in which case such representative shall have as many votes as countries represented.

The American Republics therefore have a free hand in the choice of their representatives.

The Fifth International Conference of American States, held in 1923 in Santiago de Chile, had provided that in the absence of a diplomatic representative the state affected could appoint a representative. This was a wise resolution, inasmuch as it might happen that the Government of the United States would not recognize a government of one of the other republics, and therefore that republic would have no representative. This has happened in the past, but it cannot happen in the future.

It was also proposed that the Secretary General should not be a permanent official; that he should serve for a year and be a national of each of the countries in their alphabetical order. This proposition was wisely rejected.

It was further proposed that the Union should endeavor to remove the "tariff barriers" of the American Republics. This proposition met with general opposition, inasmuch as the tariff is a matter of domestic regulation in all countries, and beyond, it would seem, the functions of a non-political union. It was therefore rejected.

It was proposed and adopted that the members of the Union should be free to withdraw at any time, but that they should pay "their respective quotas for the period of the current fiscal year." It is to be hoped that no American Republic will avail itself of this provision.

It is generally understood that the preamble to a convention does not have the effect of an article. This does not mean, however, that it is without importance. The preamble to the Constitution of the United States does not confer power, but it states the purpose of its framers in such a way as to affect the interpretation of articles conferring power. Much time was devoted by the commission to the preamble of the convention on the Pan American Union which was ultimately adopted and unanimously in the following form:

> The American Republics, whose moral union rests on the juridical equality of the Republics of the Continent and on the mutual respect of the rights inherent in their complete independence, desirous of promoting efficaciously the harmonious development of their economic interests, and the coördination of their social and intellectual activities, and recognizing that the relations between peoples are regulated by law as well as by their legitimate individual and collective interests;
>
> Agree to continue their joint action of coöperation and solidarity by means of periodic meetings of the International American Conferences

> as well as by means of organs established in virtue of international agreements, and through the Pan American Union, which has its seat in Washington, and whose organizations and functions shall be regulated by the present Convention, . . .

By resolution it was wisely provided that the Union should continue to operate as heretofore with certain modifications of present procedure taken from the convention until it should be ratified by all the American Republics.

Commission No. 2 on Public International Law and Frontier Police

Twelve projects of public international law had been drafted by the Commission of Jurists meeting in Rio de Janeiro in 1927, in accordance with a resolution of the fifth of the American Conferences. These projects were submitted to the Conference at Habana, and formed the basis of discussion. In the end, seven conventions based upon the projects of Rio were adopted: (1) The Status of Aliens; (2) Duties of Neutral States in the Event of Civil Strife; (3) Treaties; (4) Diplomatic Functionaries; (5) Consular Agents; (6) Maritime Neutrality, and (7) Asylum.

The first two of the Rio projects, on the Fundamental Bases of International Law, and States, gave rise to prolonged discussion. Article 3 on States provided that "No state may intervene in the internal affairs of another." It was proposed by the reporter on these two projects, the distinguished delegate from Peru, Victor M. Maurtua, to replace this abstract formula with the following concrete statement, involving a duty as well as a right:

> Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."

Unable to agree upon a formula of general principles acceptable to all, the Conference referred the matter to the Seventh Conference. It is to be said, however, that the exchange of views will constitute a valuable document.

There were two resolutions of supreme importance adopted by the commission. The first, introduced by Mr. Gonzalez Roa on behalf of the Mexican delegation, was immediately accepted by Mr. Hughes on behalf of the delegation of the United States. The second resolution is the result of an exchange of views in the commission by Mr. Lira, on behalf of Chile, Mr. Maurtua, on behalf of Peru, and Mr. Hughes, in the form of a report produced by a subcommittee to which the matter was submitted.

The text of the first resolution, slightly modified in the form in which it was presented and adopted by the plenary session of the conference, and the text of the second resolution, without change, follow:

> The Sixth International Conference of American States, considering:
>
> That the American nations should always be inspired by a solid coöperation for justice and the general good:

That nothing is so opposed to this coöperation as the use of violence:

That there is no international controversy, however serious it may be, which cannot be peacefully arranged if the parties desire in reality to arrive at a pacific settlement;

That war of aggression constitutes an international crime against the human species;

Resolves:

1. All aggression is considered illicit and as such is declared prohibited;
2. The American States will employ all pacific means to settle conflicts which may arise between them.

The Sixth International Conference of American States resolves:

Whereas: The American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations; and

Whereas: The American Republics have the most fervent desire to contribute in every possible manner to the development of international means for the pacific settlement of conflicts between States;

1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international differences of a juridical character.
2. That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the States, as well as matters of a domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a State not a party to the convention.
3. That the Governments of the American Republics will send for this purpose plenipotentiary jurisconsults with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction.
4. That the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficial institution up to its maximum.
5. That the convention or conventions which may be agreed upon, after signature, should be submitted immediately to the respective Governments for their ratification in the shortest possible time.

Commission No. 3 on Private International Law and Legislative Uniformity

This commission has the honor of having adopted for the first time in history a code of private international law in an international conference composed of delegates plenipotentiary. It was drafted originally by Dr. Antonio Sanchez de Bustamante y Sirvén, of Cuba. It was modified in non-essentials by the Commission of Jurists at Rio, and by that body submitted to the Sixth of the American Conferences.

Among the resolutions adopted by the commission and approved in plenary session were two of far-reaching importance. The first resolution is thus worded:

The Sixth International Conference of American States resolves:

That there be created an inter-American Commission of Women charged with the preparation of a legal and any other report which may be considered necessary in order that the Seventh international Conference of American States may undertake the study of the civil and political equality of women of the continent.

Said commission shall be constituted by seven women of different countries of America designated by the Pan American Union and thereafter shall be completed by the commission itself until each country of America is represented thereon.

The second resolution is thus worded:

The Sixth International Conference of American States resolves:

1. The future formulation of international law shall be made by means of a technical preparation duly organized with the coöperation of the committees on investigation and international coördination and of the scientific institutes hereinafter mentioned.

2. The International Commission of Jurists of Rio de Janeiro shall meet on the dates set by the respective governments to carry on the work of codification of public and private international law, the Pan American Union being charged with the preparation of the pertinent resolution for the purpose of said meeting.

3. Three permanent committees shall be organized, one in Rio de Janeiro, for the work on public international law; another at Montevideo, for the work on private international law, and another at Habana to undertake the study of comparative legislation and uniformity of legislation. The functions of said organizations will be:

(a) To present to the governments a list of the subjects susceptible of codification and uniformity of legislation, including those definitely subject to regulation and formulation, and those which international experience and new principles and aspirations of justice indicate require prudent juridical development.

The presentation of this list shall be for the purpose of obtaining from the governments a statement as to the subjects which in their opinion might be the object of study as a basis of the formulation of conventional regulations or of organic declarations.

(b) To classify, on the basis of the aforesaid list and of the replies of the governments, the subject matter in the following manner: (1) subjects which are susceptible to codification because they have the unanimous consent of the governments; (2) subjects susceptible of being proposed as subject to codification because while not unanimously supported, they represent the predominant opinion of the governments; (3) subjects with respect to which there is no predominant opinion in favor of immediate regulation.

(c) To present the foregoing classification to the governments in order to ascertain their general views with respect to the manner in which the juridical problems of codifiable subjects can be brought up and resolved, as well as all information and juridical, legal, political, diplomatic and other antecedents which might lead to a complete understanding.

(d) To request and obtain from the national societies of international law their scientific opinion and their general views regarding the regula-

tion and formulation of the juridical questions which are the objects of these committees.

(e) To organize all the foregoing material and remit it together with drafts of projects to the Pan American Union, which shall submit them to the scientific examination of the Executive Council of the American Institute of International Law so that it may make a technical study of said drafts and present its conclusions and formulas, with full explanations, in a report on the subject.

4. Likewise, the opinion of the Inter-American High Commission as a technical adviser, shall be consulted in economic, financial and maritime matters.

5. When the studies and the formulas above mentioned have been presented, the governments shall be advised, and they may order a meeting of the Commission of Jurists, if they consider it proper, or the inclusion thereof in the program of a future international conference.

6. In order to include in the program of the International American Conferences matters susceptible of codification or of legislative uniformity or to include them in the program of the Commission of Jurists, in the event that it be so agreed, it shall be necessary that the governments shall have become acquainted with the projects and antecedents referred to, at least one year in advance.

7. The three committees above mentioned shall be formed by the governments with members of the respective national societies of international law. They shall communicate with the governments and the Executive Council of the Institute through the Pan American Union.

8. When considered opportune, a commission of jurists versed in the civil legislation of the countries of America may be constituted in order that it may proceed to study said legislations and prepare a uniform project of civil legislation for the countries of America, especially of Latin-America, selecting the means to obviate the inconveniences resulting from the diversity of legislation.

9. To the extent permitted by its by-laws, the Pan American Union will coöperate in the preparatory work referred to in the preceding articles.

Commission No. 4 on Communication

This commission adopted a convention on aviation, and resolutions dealing with the regulation of international automotive traffic; the means for facilitating the development of fluvial intercommunication between the nations; international regulations of railway traffic, and the adoption of the original Andean route of the Pan American railway; the convocation by the Pan American Union of a technical conference to study questions of establishing steamship lines and the elimination of unnecessary port formalites, and a recommendation that the signatories of the Electrical Communications Convention of 1924 and the Radiotelegraphic Convention of Washington of 1927, ratify as soon as possible.

Commission No. 5 on Intellectual Coöperation

Among the positive results of this commission are a convention establishing a Pan American Geographical Institute, in Habana, and one for the creation

of an Inter-American Institute of Intellectual Coöperation, likewise in Habana. These two institutes deal with fields in which the American Republics can collaborate upon a basis of exact equality without involving political consideration.

There is also a proposal for an American bibliography, and the complete publication of Rufino J. Cuervo's *Dictionary of Construction and Regimen of the Spanish Language*. By way of comment, it may be said that Cuervo's dictionary as far as it goes is the great standard of the Spanish world. It was published in part in 1886–1893. Its completion and publication will be an international event of no mean importance.

Commission No. 6 on Economic Problems

A number of resolutions were passed, among others, one dealing with uniformity of consular fees and the standardization of consular procedure; a report on the Chambers of Commerce advocating a special study of the development of relations among commercial organizations of the American states; the adoption of certain recommendations concerning emigration and immigration, and the recommendation of the convocation of a special conference on trade-marks.

Commission No. 7 on Social Problems

The name of this commission was changed to Commission on Hygiene and Social Problems. Some nineteen resolutions or recommendations, all of value and some of far-reaching importance, were adopted.

Commission No. 8 on Treaties, Conventions and Resolutions

This commission had but a single topic dealing with "the action taken by the states represented at the previous Pan American Conferences on the treaties, conventions, and resolutions adopted at said conferences." The report of the commission was informative, resulting in the following resolution:

> The Sixth International Conference of American States resolves:
>
> Whereas: (a) It often happens that the programs of Pan American Conferences contain important subjects not accompanied by the technical studies pertinent thereto, the more so if it is a matter of the revision of treaties or conventions;
>
> (b) It is necessary to enlighten the judgment of the delegates, calling their attention to the most important points of the subject inserted:
>
> 1. To recommend to the Pan American Union that in inserting in the programs of the conferences subjects related to the modification or alteration of conventions or treaties, it direct that technical studies on the subject be made within a reasonable length of time.
>
> 2. The Pan American Union shall submit to the International American Conferences series of propositions based on the text of the technical studies and which shall serve as a safe basis for the discussion.

The decision to preserve the Pan American Union as it had developed in the forty years of its existence, without returning to its humble beginnings, and without embarking upon political and unchartered seas, and to establish the Union by convention instead of resolutions capable of being made and unmade in each successive conference; the unanimous declaration that aggressive warfare is a crime against humanity and that all of the conflicts between the American states should be settled peaceably; the adoption of the principle of compulsory arbitration for the settlement of differences involving a legal right, saving, however, domestic questions and disputes affecting the sovereignty and independence of the contracting parties, and withholding from arbitration the matters "involving the interest or referring to the action of a state not a party to the convention"; the solemn promise on the part of the twenty-one republics to send to Washington within a twelvemonth jurisconsults clothed with plenipotentiary powers to conclude a convention to render the agreements effective, and by means of an additional protocol to enable those of the republics caring to do so, to bind themselves to submit all differences of every category to arbitration, with those willing to accept the larger obligation; eleven conventions—nine of them dealing with public international law, are in effect nine chapters of a code of international law for the Americas: a code of the conflict of laws composed of 437 articles; agreements upon laws and ways of communication; agreements upon intellectual coöperation, with the exchange of professors and students between and among the American Republics; and some sixty resolutions—these are the positive results of the Sixth International Conference of American States meeting but a month, in the city of Habana.

The workers in the field must indeed have been alert and active when they garnered such a vast and promising harvest. The great outstanding feature is that the Sixth Conference met and adjourned with a promise of a Seventh Conference, and the friends of Pan Americanism hope that the seventh will be but the next of an infinite series of conferences of the American states. The conference is greater than any of its measures, however great they may be; and the Pan American Conference has stood the test of time; it has stood the test of criticism; and by its works has justified its creation. Bolívar of the South thought of an America with international conferences; Blaine of the North has transmuted thought into fact. As Sr. Varela said in the closing words of his address in the last session of the Sixth International Conference of American States, "Let us salute the future, which is the province of the generations of America."

The American delegation was composed of Charles Evans Hughes, Noble Brandon Judah, Henry P. Fletcher, Oscar W. Underwood, Dwight W. Morrow, Morgan J. O'Brien, James Brown Scott, Ray Lyman Wilbur, and Leo S. Rowe. Each and every one of them went to Habana to collaborate with the delegations of the other republics, and to take part in the deliberations so as to advance the projects presented by other delegations, without

presenting projects of their own. The American delegation acted as a unit on every occasion, without a difference of opinion on any subject, and the American delegation was its chairman, Charles Evans Hughes.

JAMES BROWN SCOTT.

THE NEW ARBITRATION TREATY WITH FRANCE

The Senate has given its advice and consent to the ratification of the new arbitration treaty between the United States and France, which was signed on February 6, 1928, on the understanding, however, that it does not impose any limitation on the so-called Bryan Peace Treaties, and notes to that effect were exchanged between the two governments before ratifications were exchanged.[1]

This treaty is put forward as a model which the Government of the United States desires to adopt in substitution for the so-called Root Arbitration Treaties, not only with France, but with a number of other Powers with which the Root Treaties have either expired, or are about to expire, by reason of the time limitation imposed by their own terms.

The preamble of the new treaty recites:

> Desirous of reaffirming their adherence to the policy of submitting to impartial decision all justiciable controversies that may arise between them;
>
> Eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the Powers of the world;

The two governments have accordingly concluded this "new treaty of arbitration enlarging the scope of the arbitration convention signed at Washington on February 10, 1908, which expires by limitation on February 27, 1928, and promoting the cause of arbitration."

Unfortunately, and perhaps inevitably in the circumstances, this new treaty of arbitration does not seem entirely adequate for the accomplishment of the ambitious program set out in the preamble.

In considering the question of how far this new treaty makes any useful or important additions to our previous arbitration and conciliation treaties with other Powers requiring compulsory investigation, or arbitration of pending, or future questions, it is necessary to review briefly its antecedents and historical background and then to compare its terms with those of our other treaties for the pacific settlement of international disputes.

Disregarding arbitration treaty projects signed on the part of the United States but not ratified, the most noteworthy of which are the project adopted

[1] For the text of the treaty and exchange of notes, see Supplement to this JOURNAL, pp. 37 and 39.

by the Inter-American Conference of 1890[2] and the Olney-Pauncefote Treaty of 1897,[3] the first general arbitration treaty entered into and ratified by the United States was the Hague Convention of 1899 for the Pacific Settlement of International Disputes. This convention has since been superseded by the Hague Convention of 1907, having the same title, which later convention is still in force.

This convention provides for recourse to the good offices or mediation of friendly Powers before an appeal to arms, and the parties agree "to use their best efforts to insure the pacific settlement of international differences" with a view to avoiding recourse to force. Provision is also made for international commissions of inquiry "in disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact," to facilitate a solution "by elucidating the facts."

This convention recites that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle." The convention accordingly provides for a Permanent Court of Arbitration, under which special arbitral tribunals are to be constituted by special agreement in each case, but it leaves undisturbed general or private treaties making arbitration obligatory on the contracting Powers, and they reserve to themselves "the right of concluding new agreements, general or particular, with a view of extending compulsory arbitration to all cases which they may consider it possible to submit to it."

The Final Act of the 1907 Hague Conference recites that

> It is unanimous—
> 1. In admitting the principle of compulsory arbitration.
> 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction.

This Hague Convention of 1907 was followed by the so-called Root Arbitration Treaties, which are identical in form with the unratified arbitration treaties negotiated by Secretary Hay, except that in the Root Treaties is incorporated the provision, which was imposed by the Senate as a condition for the ratification of the Hay Treaties, providing that the special agreement, which was required in each case as a preliminary to arbitration proceedings, could be made on the part of the United States only by and with the advice and consent of the Senate.

As above stated, the new treaty now under consideration is intended to replace the Root Treaty of 1908 with France, which, after four renewals of five

[2] Moore's International Law Digest, Vol. 7, p. 70.
[3] *Ibid.*, p. 76; also in Supplement to this JOURNAL, Vol. 5 (1911), p. 88.

years each, expired on February 27, 1928.[4] The Root Treaties all adopted the arbitration organization established by the Hague Convention of 1899 for the Pacific Settlement of International Disputes, subject to the proviso, however, that the questions to be arbitrated "do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties."

In chronological order, the next treaty of importance as a model treaty is the treaty of 1909 with Great Britain, concerning the boundary waters between the United States and Canada, which treaty was also negotiated by Secretary Root.[5] This treaty also follows the lead of the above mentioned Hague Conventions of 1899 and 1907 and establishes a Joint Commission of Inquiry, which plan was further developed and given wider application in the unratified Taft Treaty of 1911 with Great Britain[6] and again in the Bryan Peace Treaties of 1914, which are now in force and will be considered below.

The Canadian Boundary Waters Treaty concerns only the United States and Canada, and provides for the reference to a joint commission of inquiry thereby established of any questions or matters of difference "involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and the Dominion of Canada." In accordance with the well recognized necessity for limiting the authority of commissions of inquiry, this treaty provides that the reports of the commission "shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award."

The commission of inquiry provisions of the Taft Treaty with Great Britain required that at the request of either party all differences arising between them, which it had not been possible to settle by diplomacy, should be referred either at once or, in some cases, after the expiration of a year from the date of the request, to a Joint High Commission of Inquiry, to be constituted as therein provided, "for impartial and conscientious investigation." The commission was authorized to report on the questions referred to it "for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate." The usual proviso was added that "the reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award."

Although the Taft Treaty was not ratified, its provisions relating to commissions of inquiry were approved without change by the Senate, and closely

[4] Printed in Supplement to this JOURNAL, Vol. 2 (1908), p. 296.
[5] *Ibid.*, Vol. 4 (1910), p. 239.
[6] *Ibid.*, Vol. 5 (1911), p. 253.

resemble the Bryan Peace Treaties[7] later entered into by the United States with some twenty other nations, pursuant to the advice and consent of the Senate.

The chief difference between the commission of inquiry provisions in the Taft Treaty and in the Bryan Treaties was that in the latter the commission is to be a permanent organization appointed and maintained without waiting until occasion for its services should arise, and that the commission may by unanimous agreement volunteer its services to investigate and report about any dispute which the parties have failed to adjust by diplomatic methods, and also that the parties agree "not to declare war or begin hostilities during such investigation and before the report is submitted."

The new model treaty with France incorporates by reference, in Article I, the provisions of the Bryan Treaties. One of the notable features of the Bryan Treaties is that they provide that any disputes, of whatsoever nature they may be, and without any exceptions, arising between the parties to the treaty, shall, when ordinary diplomatic proceedings have failed and the parties have not had recourse to arbitration, be submitted for investigation and report. This provision of the Bryan Treaties is reproduced almost word for word in Article I of the new treaty, but Article III of this treaty was construed by the Senate Foreign Relations Committee as imposing exceptions and reservations as to disputes involving certain questions not excepted in the Bryan Treaties. The following is the text of Article III:

> The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which
> "(a) is within the domestic jurisdiction of either of the high contracting parties,
> "(b) involves the interests of third parties,
> "(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,
> "(d) depends upon or involves the observance of the obligations of France in accordance with the Covenant of the League of Nations."

On a strict construction of the terms of Article III these exceptions apply to all the provisions of the treaty, including Article I, which has reference to the commissions of inquiry under the Bryan Treaty. It now appears, however, that it was not intended that these exceptions should apply to the Bryan Treaty commissions of inquiry, which would be distinctly a step backward in our policy for the pacific settlement of international disputes. In order to remove all possible doubt on this subject, Secretary Kellogg had, as stated above, committed the two governments to this understanding by an exchange of notes before the treaty was ratified.[8]

Another question which suggests itself as to the effect of this treaty on the

[7] The treaty with France is printed in Supplement to this JOURNAL, Vol. 10 (1916), p. 278.
[8] Supplement to this JOURNAL, p. 39.

Bryan Treaty with France is whether that treaty can be terminated while this treaty remains in force.

Article II of the new treaty corresponds almost word for word with Article I of the Taft Treaty, and reads as follows:

> All differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above mentioned Permanent International Commission and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other competent tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue and settle the terms of reference.
>
> The special agreement in each case shall be made on the part of the United States of America by and with the advice and consent of the Senate thereof, and on the part of France in accordance with the constitutional laws of France.

The Senate decided, in considering the corresponding provisions of Article I of the Taft Treaty, that these provisions covered too wide a field and that certain subjects should be expressly excluded from the scope of the proposed plan of arbitration. The Senate accordingly imposed as a condition for its assent to the ratification of the Taft Treaty a reservation that:

> The treaty does not authorize the submission to arbitration of any question which affects the admission of aliens in the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or moneyed obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.

Presumably the exceptions in Article III, above quoted, of the new treaty are intended to have the effect of excluding from arbitration all of the questions thus excluded by the Senate resolution. Any dispute involving the maintenance of the American attitude concerning the Monroe Doctrine is expressly excluded, and the new treaty goes even beyond the Senate reservations made to the Taft Treaty by excluding any questions involving the interests of third parties and the obligations of France in accordance with the Covenant of the League of Nations.

The remaining exception in the new treaty, which excludes "any dispute the subject matter of which (a) is within the domestic jurisdiction of either of the high contracting parties," is doubtless intended to exclude all the other

questions excluded in the Senate reservations relating to the Taft Treaty. This exception certainly accomplishes that purpose, but its terms may be interpreted as having a much more extensive meaning than perhaps was intended. A reservation from arbitration of every dispute, the subject matter of which is within the domestic jurisdiction of a nation, if literally interpreted, means that no question is to be arbitrated which involves the exercise of the domestic authority of a government in either its legislative, executive or judicial capacity within its constitutional jurisdiction, even if it involves a question of right under international law. Such interpretation would exclude from arbitration practically every dispute which did not arise either from the action of a government in the exercise of some unconstitutional authority, or as the result of some governmental action outside of the territorial jurisdiction of the government.

It has come to be recognized in recent years that while purely domestic questions are not proper subjects for compulsory arbitration, this exception comprises only questions which are *exclusively* within the national jurisdiction, such as immigration, taxation, governmental policies, etc., many of which are expressly enumerated in the above-quoted Senate reservation to the Taft Treaty. To go beyond these minimum exceptions, which are now generally considered "indispensable to safeguard the independence and the sovereignty of the States, as well as its exercise in matters within their domestic jurisdiction" (resolution adopted by the recent Pan American Conference at Havana), and to exclude every subject within the domestic jurisdiction of either party, is to take a retrogressive step not in harmony with the purposes announced in the preamble of this treaty.

So far as our relations with France are concerned, the question is, perhaps, of no real importance, but our national interests might be seriously compromised if this new model treaty should be adopted with Mexico, and by virtue of the exceptions under consideration that government be thereby given the right to exclude from arbitration with us any dispute the subject-matter of which is within the domestic jurisdiction of Mexico, irrespective of whether or not such dispute involved a question of our rights under international law.

Another point which calls for passing consideration is found in the use of the phrase "by the application of the principles of law or equity" in the definition of justiciable questions in Article II of this treaty. This phrase, as above stated, was used in the same way in Article I of the Taft Treaty, and the majority report of the Senate with reference to that treaty objected to the use of the word "equity" in this phrase, as a test of the justiciable nature of a controversy, on the ground that:

> In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We

> are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

Inasmuch as the Taft Treaty was between the United States and Great Britain, this particular objection did not lead to a reservation by the Senate with reference to that treaty, but it was clearly foreshadowed that this objection would be made to this use of the word "equity" in a treaty between the United States and France or other countries not having the same common understanding which Great Britain and the United States have as to its meaning. Inasmuch as this new model treaty is with France it is significant of a change in the views of the Senate that it has not required any definition of the word "equity" as used in this treaty.

It may be said that these criticisms are negligible, even if well founded, because this treaty contains the usual proviso requiring, as a preliminary to arbitration in any case, the adoption of a special agreement between the parties, which on the part of the United States can be entered into only by and with the advice and consent of the Senate, so that in that way the questions to be arbitrated and the terms of submission are always subject to its final control. A treaty which goes no further than that, however, can hardly be said to serve as a model for the purposes set out in the preamble of this treaty.

In conclusion, this new treaty is on the whole disappointing in that it fails to coördinate and consolidate the progress heretofore made in the field of general arbitration and, on the contrary, in the respects above pointed out, it abandons some of the gains made in previous treaties; also it makes no specific provision for facilitating the arbitration of pecuniary claims, and it does not furnish a model in form suitable for use generally with all nations.

CHANDLER P. ANDERSON.

THE NEW ARBITRATION TREATY WITH FRANCE

The Government of the United States seldom loses an opportunity to profess its loyalty to international arbitration in the abstract. At a meeting of the Preparatory Commission for the Disarmament Conference, held in Geneva on November 30, 1927, the American representative stated that "the United States has always championed the idea of international arbitration and conciliation, both in principle and in practice," and "welcomes the extension of the practice"; but at the same time he announced the refusal of the United States to participate in the work of an international committee on arbitration and security.[1] On December 28, 1927, in a communication to the

[1] League of Nations Document, C. 667, M. 225, 1927, IX.

French Minister of Foreign Affairs, the Secretary of State emphasized that "the Government of the United States welcomes every opportunity for joining with the other Governments of the world in condemning war and pledging anew its faith in arbitration." [2] The expression of this sentiment has become so conventional that a popular impression prevails that it accords with the actual policy of the United States.

The expiration of a number of the arbitration treaties entered into by the United States before the war,[3] now furnishes an occasion for a concrete application of the American Government's attitude toward arbitration; and the treaty with France, signed on February 6, 1928, indicates the lines which will probably be followed for some time to come. An analysis of this treaty may furnish a basis for an appraisal of our present policy, and its comparison with other arbitration treaties may show how far we have kept abreast of the progress made by other countries.

The new treaty with France is very inept in its drafting. The texts in English and in French have "equal force," but only the English text was transmitted to the Senate.[4] The text was so drafted as to make it doubtful how far the new treaty would leave in force all the provisions of the conciliation treaty of September 15, 1914—the so-called Bryan treaty—and the Secretary of State has exchanged notes with the French Ambassador to clear up this doubt.[5] Article 1 of the new treaty is chiefly a re-declaration of a part of Article 1 of the Bryan treaty; but Article 3 would restrict the application of the re-declared provision by setting up certain categories of disputes in respect of which it is not to be invoked, whereas no such exceptions were made in 1914.

The provision for arbitration in Article 2 of the new treaty, is a re-draft of the provision in the treaty of February 10, 1908.[6] The earlier treaty envisaged the arbitration of differences "of a legal nature, or relating to the interpretation of treaties"; the later treaty envisages the arbitration of differences "relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, . . . which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." The new language seems to mark little advance on the old, for it indicates no broadening of the scope of the treaty. The earlier treaty covered differences "which it may not have been possible to settle by diplomacy," while the later treaty covers differences "which it has not been

[2] Department of State press release, January 3, 1927.

[3] The Root treaty with France expired on February 27, 1928; that with Great Britain will expire on June 4, 1928; with Norway on June 24, 1928; with Japan on August 24, 1928; with Portugal on November 14, 1928; and with the Netherlands on March 25, 1929.

[4] See Senate Document, 70th Cong., 1st Sess., Executive D.

[5] Supplement to this JOURNAL, p. 39.

[6] This treaty was extended by an agreement signed on July 19, 1923, which expired on February 27, 1928. See U. S. Treaty Series, No. 679.

possible to adjust by diplomacy" and "which have not been adjusted" by conciliation. The old provision was that differences should be "referred to the Permanent Court of Arbitration"; the new provision is that they shall be "submitted to the Permanent Court of Arbitration . . . or to some other competent tribunal, as shall be decided in each case by special agreement." Any tribunal would be "competent," for submission to which a special agreement provides. This seems to keep a door open for reference to the Permanent Court of International Justice, but it also keeps a door open for any special tribunal upon which the parties may agree.[7] Under the later treaty, the special agreement is to provide for the organization of the tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference. No permanent machinery need be used. "Reference" and "submission" seem to be employed as equivalent, though this is not wholly clear.

It is in the exclusions that the two treaties differ chiefly. The treaty of 1908 excluded from the obligation to arbitrate, differences which "affect the vital interests, the independence, or the honor of the two contracting states," and differences which "concern the interest of third parties." Article 3 of the new treaty stipulates that the provisions of this treaty shall not be invoked in respect of four kinds of disputes. It is not clear why two words "disputes" and "differences" were used in the treaty, but perhaps they are to be taken as equivalent. The exclusions of the new treaty relate to disputes of which the subject matter

> (a) is within the domestic jurisdiction of either of the High Contracting Parties,
> (b) involves the interests of third parties,
> (c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,
> (d) depends upon or involves the observance of the obligations of France in accordance with the Covenant of the League of Nations.

Of these, (a), (c), and (d) are new. Certainly the dropping of the exclusion of disputes affecting "the vital interests, the independence, or the honor of the state" is to be welcomed. But does the new language go much further? Under the new treaty, not only must a difference relate "to an international matter" but it must not be "within the domestic jurisdiction" of either state. This language is borrowed from the Covenant of the League of Nations which, in Article 15, provides that disputes submitted to the Council of the

[7] When the Root treaty with France was extended on July 19, 1923, it was agreed that if the Senate should give its consent to the adhesion by the United States to the Protocol of Signature of December 16, 1920, the two governments would consider a modification of the treaty providing for the reference of disputes mentioned in the treaty to the Permanent Court of International Justice. U. S. Treaty Series, No. 679. With the signature of the treaty of February 6, 1928, that possibility ceases to be envisaged.

League of Nations "found by the Council to arise out of a matter which, by international law, is solely within the domestic jurisdiction" of a party, shall not be the subject of a recommendation by the Council. Under the Covenant, there is to be an international determination of what is within domestic jurisdiction, but under the treaty of February 6, 1928, each party is left free to make its own determination of this point. Moreover, the expression "domestic jurisdiction" is of uncertain content. It was recently said by the Permanent Court of International Justice: [8] "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." The expression "domestic jurisdiction," as used in the new treaty, may be made to serve practically the same office of exclusion as would have been served by the expression "the vital interests, the independence, or the honor" in the previous treaty. It is a common process in human affairs to throw away an expression which has acquired an unpleasant "psychic fringe," and to substitute a new expression of similar content. This process seems to have been followed in drafting the new treaty. The phrase "domestic jurisdiction" represents little advance, therefore, unless, as in the Covenant of the League of Nations, there is a power conferred to determine its application.

The exclusion of disputes of which the subject matter "depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine," seems to be an innovation in arbitration treaties of the United States. It is questionable whether this exclusion adds anything of legal significance, for it seems most improbable that a difference based on a claim of right, which would be susceptible of decision by the application of the principles of law or equity, would depend upon or involve the maintenance of the Monroe Doctrine.[9] The language of the new arbitration treaty is broader than Article 21 of the Covenant of the League of Nations, which provided merely that nothing in the Covenant should be deemed to affect the "validity" of the Monroe Doctrine.

The treaty of 1908 provided that the special agreement for submitting to arbitration, should be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate, and this language is repeated in Article 2 of the new treaty. The President has a power, which was exercised in the Pious Fund arbitration, to agree to certain arbitrations without the advice and consent of the Senate. In the future, certain arbitrations with France might be agreed to by the President of the

[8] In Advisory Opinion, No. 4. Publications of the Court, Series B, No. 4, p. 24.

[9] On the meaning of "equity" in international law, see Fred K. Nielsen, Report on American and British Claims Arbitration, pp. 277 ff.

United States alone, but the obligation to arbitrate does not necessitate the exercise of this power by the President.

On the whole, the twenty years which have elapsed since the signing of the treaty of 1908, seem to have brought no advance in the arbitration policy of the United States. The new treaty is so full of conditions and leaves so many loopholes for contention, that it is in no real sense a provision for obligatory arbitration. Before the obligation to arbitrate could ever become effective under the new treaty, at least seven conditions would have to be met, and a special agreement to arbitrate would have to be made and would have to receive the advice and consent of the American Senate. The treaty, therefore, realizes little of the purposes so expansively expressed in its preamble. It may even be doubted whether much purpose is to be served by treaties of this character, although they may afford some basis for insistence on peaceful settlement.

The United States and France declare, in the preamble, that they are "eager by their example . . . to demonstrate their condemnation of war as an instrument of national policy" and to hasten the time when the possibility of war shall have been "eliminated forever." To determine how far their example may be persuasive to other countries, it is necessary to examine the content of other arbitration treaties.

The relations between France and Germany are such as to make it far more probable that acute differences may arise between those two countries than between France and the United States; with the United States, France has had more than a century of unbroken peace; with Germany she has had two wars during the last sixty years. Yet in the treaty first initialled at Locarno, France and Germany agreed[10] to submit for decision "either to an arbitral tribunal or to the Permanent Court of International Justice," all "disputes of every kind" with regard to which "the Parties are in conflict as to their respective rights." Provision is made that if the parties fail to agree on a *compromis*, either may take the dispute before the Permanent Court of International Justice. Moreover, questions not covered by that provision are to be submitted to a conciliation commission, and if as a result no agreement is reached, the question is to be brought before the Council of the League of Nations under Article 15 of the Covenant. This goes far beyond the Franco-American treaty of February 6, 1928. Other Locarno treaties of the same extent were made by Belgium and Germany,[11] by Czechoslovakia and Germany,[12] and by Poland and Germany.[13]

If American thought would give a special place to the Locarno treaties, then the treaty between Italy and Switzerland of September 20, 1924,[14] may seem more illustrative of the progress made in these later years. Under this treaty, all disputes of any character whatsoever are to be submitted to a

[10] See 54 League of Nations Treaty Series, p. 315.
[11] See 54 *Ibid.*, p. 303.
[12] 54 *Ibid.*, p. 341.
[13] 54 *Ibid.*, p. 327.
[14] 33 *Ibid.*, p. 92.

permanent conciliation commission, and failing a settlement by that means either party may bring the dispute before the Permanent Court of International Justice, which may deal with non-legal disputes *ex aequo et bono*. Moreover, a dispute as to the interpretation of the conciliation and arbitration treaty itself may be carried before the Permanent Court of International Justice by either party. A treaty between Belgium and Denmark,[15] signed on March 3, 1927, goes almost as far, providing for the submission of all questions not otherwise settled to the Permanent Court of International Justice. Other treaties which go much beyond the scope of the Franco-American treaty are the following: France-Switzerland, April 6, 1925; Greece-Switzerland, September 21, 1925; Norway-Sweden, November 25, 1925;[16] Denmark-Sweden, January 14, 1926;[17] Denmark-Norway, January 15, 1926;[18] Finland-Sweden, January 29, 1926;[19] Denmark-Finland, January 30, 1926; Roumania-Switzerland, February 3, 1926;[20] Austria-Czechoslovakia, March 5, 1926;[21] Denmark-Poland, April 23, 1926;[22] Italy-Spain, August 7, 1926; Germany-Italy, December 29, 1926; Belgium-Switzerland, February 5, 1927.

The foregoing analysis and comparison seems to the writer to justify the conclusion that the United States has lost her share of the leadership in the movement for international arbitration, and that she is today lagging far behind other countries in the development of this means of peaceful settlement of disputes. One of the chief reasons for this situation is the fact that the United States has no part in maintaining and developing the permanent machinery of the League of Nations and the Permanent Court of International Justice, and is therefore precluded from a full utilization of such machinery in its arbitration treaties. At any rate, the preamble to the new treaty contains several statements which can only be read in other countries as irony.

MANLEY O. HUDSON.

THE SETTLEMENT OF WAR CLAIMS ACT OF 1928

On March 10, 1928, the President signed the Settlement of War Claims Act of 1928. It embraces subjects of great importance to international law and to American foreign policy.[1]

The Act provides in its main divisions for three distinct matters: (1) the payment of the American claims against Germany, Austria and Hungary; (2) the return of the property of nationals of Germany, Austria and Hungary,

[15] League of Nations Treaty Registration, No. 4542. [16] *Ibid.* [17] *Ibid.*, No. 1417.
[18] 51 League of Nations Treaty Series, 251.
[19] League of Nations Treaty Registration, No 1418.
[20] 49 League of Nations Treaty Series, 367. [21] 55 *Ibid.*, 91. [22] 51 *Ibid.*, 349.

[1] The full text of the Act will be found in the Supplement to this JOURNAL, p. 40.

held by the Alien Property Custodian; (3) payment by the United States for the private property of German citizens requisitioned during the war by the United States Government, mainly merchant ships and patents.

1. The American claims against Germany arise out of losses sustained by American citizens during the late war, the grounds of German liability being based upon Annex 1 to Article 232 of Part VIII (Reparation clauses) and upon Article 297 of Part X (Economic clauses) of the Treaty of Versailles. These articles in their relation to the claims of American citizens and to the awards of the Mixed Claims Commission, United States and Germany, were discussed in editorials in this JOURNAL (Volume 19, 133; Volume 20, 69). Inasmuch as many of these clauses, particularly so far as concerns war damage, impose liability without fault, it may be said that the decisions of the commission do not represent precedents as to liability recognized by international law, apart from the specific treaty under which the cases were decided. Although this is not the first time mixed claims commissions have had an umpire who was a national of one of the countries before the tribunal, it is probable that few umpires have performed their arduous and responsible task with as much skill and general approval from both sides as has Judge Parker. His work is a tribute to the institution of international arbitration and reflects credit upon his country.

American claims to an amount of nearly one and a half billions of dollars were submitted to the commission. Awards have been rendered to the amount of some 120 million dollars, exclusive of interest at 5 per cent for an average period of some eight years. This amount is likely to be increased somewhat by the submission of "late claims," that is, claims which were not submitted by April 9, 1923, in accordance with the terms of the original agreement of August 10, 1922. The Act requests the President to enter into negotiations with Germany to secure, if possible, an agreement for the submission of these "late claims." The ratio between claims and awards, notwithstanding the broad terms of the Treaty, is well within the average of past claims commissions.[2] Some twelve thousand claims have already been considered, a larger number than has ever been submitted to a mixed claims commission.

For some years the question of the method of paying these claims has been a source of doubt and difficulty to the two governments. The Knox-Porter Resolution of July 2, 1921, had provided that the sequestrated property belonging to German nationals was to be retained until "suitable provision" had been made for the satisfaction of the claims of American nationals against Germany. The Treaty of Versailles, however, by directing all of Germany's external payments through the channel of the Reparation Commission, had disabled that country from making any independent promise to the United States. Finally, after the London Agreement of 1924, known as the Experts' (Dawes) Plan and the Paris Agreement of January, 1925, among the "Allied and Associated Powers," a plan was devised for the dis-

[2] See Borchard, Diplomatic Protection of Citizens Abroad, pp. 857–858.

tribution of payments from Germany, by which the United States was to receive a priority payment of 55 million marks a year commencing September, 1926, on account of Rhine Army Costs, and an amount of 2¼ per cent of the German reparations, not to exceed 45 million marks a year, on account of claims. These sums have been regularly paid to date.

In the so-called Mills Bill of 1926, evolved in the Treasury Department, it was provided that the two sums above mentioned were to be used for the payment of American claims. Eight years would have sufficed to discharge the claims; and the private property was to have been returned outright to its owners. Democratic opposition in Congress interfered with this plan, so that the 1927 and 1928 sessions of Congress dealt with another plan which in substance is the basis of the present Act. The Act leaves out of account the Rhine Army Costs (see this JOURNAL, Volume 19, p. 359). The Act provides that the Special Deposit fund or account out of which the American claims are to be paid is to be made up from the following sources: 25 million dollars out of the "unallocated interest fund" arising out of interest accumulated prior to March 4, 1923, the date of the Winslow Act, on sequestrated cash funds held in the Treasury; 20 per cent of the principal of the German private property, estimated to amount to some 50 million dollars; one-half of the amount to be appropriated for the private property—ships, patents and radio station—requisitioned by the United States Government, a sum estimated to amount to some 50 million dollars (one-half of a maximum of 100 million dollars authorized for this purpose); and the receipts from the 2¼ per cent annual payment under the Dawes Plan. Payment of claims of the United States Government, amounting to some 60 millions of dollars, arising mostly out of the sinking of Shipping Board vessels and of vessels insured by the Federal War Risk Insurance Bureau, is postponed until the private claims are taken care of, in view of the fact that the private property was designated to be held only until "suitable provision" had been made for the satisfaction of private claims. The government, moreover, had derived substantial profits from its war risk insurance.

Some 60 million dollars of private claims awards are owned by insurance companies who appeared before the commission as subrogees of owners of ships and cargoes sunk during the war. Strong demands on the floor of the House and Senate to defer these claims until the end of the list of the American claimants were defeated by close votes, so that all the American claimants share alike. The Act provides for the immediate payment of all claims under $100,000, inclusive of interest, and for a payment of $100,000 on account of all the larger claims, no claimant, however, to receive more than one payment. The larger claims, now 178 in number, will then share *pro rata* the balance of the fund in the Special Deposit Account. It is estimated that during this year some 70 per cent of all the larger claims will have been paid off. Interest at 5 per cent is to run on all the unpaid balance until future sums to be received from Germany liquidate the account. When 80 per cent of the American claims have been paid, these future sums are to be

divided equally among the claimants, the German sequestrated private property owners and the ship and patent owners.

2. The bill in its title provides "for the ultimate return of all property held by the Alien Property Custodian." In the light of American tradition, the treaty of 1828 with Prussia, the promise of President Wilson, the well-settled rule of international law, and the terms of the Knox-Porter Resolution which contemplated the complete return of the property as soon as arrangements for the payment of American claims had been made, insistent demands had been made in Congress and throughout the country for the early return of the sequestrated property. In 1923, the Winslow Act had provided for the return of all trusts under $10,000 and of $10,000 on the larger trusts, together with all interest earned subsequent to March 4, 1923, up to $10,000 per annum. In 1925, the Treasury Department assumed an active interest in the subject, and after failure of the Mills Bill, suggested a plan by which the American claimants and the German owners, as the principal parties in interest, worked out the terms of an agreement by which the larger American claimants consented to the postponement of payment of some 20 per cent of their claims in return for the German owners' consent to the temporary retention for the present of 20 per cent of their sequestrated property and of the unallocated interest fund on condition of provisions for their future reimbursement. The Act carries this agreement into effect, so that the German owners are to receive now 80 per cent of their property in kind or cash, all interest earned since March 4, 1923, in full, and 5 per cent interest-bearing Participating Certificates in future payments to come to the United States under the Dawes Plan on claims account (45 million marks per annum) for the withheld 20 per cent of the property. For the 25 million dollars of unallocated interest fund, non-interest-bearing Participating Certificates are to be issued. An amendment of Senator King, accepted by the Senate, for the payment of interest on these latter certificates, was lost in conference. It is estimated that it will take about 25 years, in normal course, to pay off the Participating Certificates in full. Section 2 of the bill as it passed the House provided for a declaration of policy in favor of the full payment of the American claims and the return of all the sequestrated property in full. The Senate struck this section out. The words "ultimate return" in the preamble perhaps justify the belief that Congress will not permit the certificates to go to default, even if the Dawes Plan breaks down, but the Act expressly provides that "the United States shall assume no liability, directly or indirectly, for the payment of any such Certificates, or of the interest thereon, except out of the funds in the Special Deposit Account available therefor, and all such Certificates shall so state on their face." Should these funds some day prove inadequate, the provision would become inconsistent with the preamble of the bill above mentioned.

The Act provides for the complete return of all the property of Austrian and Hungarian citizens with interest or income from the time of seizure. This is to be done as soon as these countries deposit in the Treasury a sum

sufficient to take care of the American claims against these countries, now estimated not to exceed about four million dollars. Provision for such deposit, it is understood, is about to be made. Judge Parker is authorized to fix the sum at which the krone, where involved in awards arising out of debt claims of American citizens, is to be valorized. (See this JOURNAL, Volume 22, p. 142.)

3. The bill provides for the submission to an arbiter to be named by the President (who has since designated Judge Parker), of the claims of the German owners of merchant vessels, patents and a radio station, requisitioned by the United States during the war. The ships were taken over by the President under a joint resolution of Congress of May 12, 1917 (40 Stat. 75). The resolution provided for an appraisal to be made by the Navy Department as of the time of taking, which appraisal was to be "competent evidence in all proceedings on any claim for compensation." The owners of the vessels had brought claims for the 1917 value of the ships in the Court of Claims on the theory of an implied contract by the United States to pay for them. The court did not find any implied contract. The Naval appraisal for the 87 vessels requisitioned, amounting to some 600,000 tons, was about 34 million dollars, or about $50 per ton. Ordinary tonnage at that time had a market value of about $300 per ton. In the testimony of the principal appraiser before the Senate Finance Committee, it appeared that the Navy Board had taken 1914 values and from those had plotted a curve of depreciation. The sum mentioned was thus arrived at. This appeared to Congress to be an underestimate, so that the bill provides that the arbiter may make a new finding as to the value of the ships, not to exceed for ships, patents and radio station, 100 million dollars in all. Senator Smoot on March 3, 1927, expressed the view that 85 million dollars was to be allocated to ships. An amendment to reduce the maximum to 75 millions was lost in both House and Senate. The present Act provides that "Such compensation shall be the fair value, as nearly as may be determined, of such vessel to the owner immediately prior to the time exclusive possession was taken under the authority of such joint resolution, and in its condition at such time, taking into consideration the fact that such owner could not use or permit the use of such vessel or charter or sell or otherwise dispose of such vessel for use or delivery, prior to the termination of the war, and that the war was not terminated until July 2, 1921." This is a curious provision, for the reference to the disability of the owner to dispose of his vessel before July 2, 1921, is contrary to fact. Free trade was restored between the United States and Germany, and ship communication reëstablished on July 14, 1919, by virtue of an order of the War Trade Board. The owners could therefore have freely disposed of their vessels on July 14, 1919. The war terminated for different purposes at different times.[3] For trade purposes the war terminated July 14, 1919, not July 2, 1921.

[3] Hudson, M. O., "The Duration of the War Between the United States and Germany," 39 Harv. L. Rev. 1020.

It is also to be observed that the owners of this requisitioned private property are to receive only half of their awards in cash and the other half in interest-bearing Participating Certificates to be served out of the Special Deposit Account (Dawes payments) above mentioned.

Several features of the Act deserve comment. It has been the writer's opinion that one of the worst arguments in support of the ratification of the Treaty of Versailles was the contention that it would enable us to confiscate private property, as some of the European countries have in fact done. Senator Knox to a limited extent unwittingly yielded to this argument by incorporating in the Knox-Porter Resolution the provision that the sequestrated private property was to be retained until the payment of the American claims had been provided for. Senator Knox expected to bring about the return of the property as soon as the treaty with Germany had been ratified, but death cut short his plans. The compromise with principle brought a delay of nearly seven years. It was the Treasury Department, actuated in part by the possible effects of the precedent of confiscating private property upon the enormous American investments abroad, which initiated the Executive policy of return. In the process of education, Senator Borah played a prominent part. The plans were complicated by the provision for the satisfaction of the American claims against Germany, and only in 1926 was a plan definitely evolved for breaking the deadlock. The present Act is necessarily a compromise. Whether the payment of the 2¼ per cent, which the Allies permitted us to receive at Paris, in 1925, constitutes or not that "suitable provision" which the Knox-Porter Resolution contemplated, will remain a debatable question. The claims would ultimately have been paid off in instalments, and we have not heretofore, except for Jackson's threat against France, undertaken to lay hold of private property because a foreign government did not meet its national obligations either promptly or at all. The principle is dangerous and the world will await with interest the outcome of the precedent of confiscating private property, under Article 297 of the treaty, which several of the European countries have indulged. (See this JOURNAL, Volume 18, p. 523.) By undertaking to return the sequestrated property, the United States establishes itself again as a free money market and a safe place for foreign investments. But all danger of confiscation is not averted. The failure to pay interest on the unallocated interest fund, though excused as a refusal merely to pay interest on interest, the failure to pay interest from the time of the requisition of private property or for the use of private property down to July 2, 1921, the failure to make good such transactions as those involved in the Chemical Foundation,—all smack of confiscation. Unless the Participating Certificates are made good, there will be confiscation. The debates disclosed a remarkable unanimity against any purpose to confiscate, and some votes were cast against the bill because the provision for the temporary retention of 20 per cent seemed too greatly to resemble confiscation. The Participating Certificates could be

redeemed out of the Rhine Army Costs, which may well be devoted to that purpose.

On the whole, the bill may be approved as the best attainable compromise under so complicated a state of facts and so divergent a group of interests. To combine so many important matters, general and specific, in one bill, is of itself an achievement of draftsmanship. But if one lesson more than another emerges from these matters, it is that the United States, and indeed any other intelligent country, should not again sequestrate enemy private property. The possibility of injury to the nation is offset by the freedom of one's own property abroad. Such possibility of injury, however, is not commensurate with the danger of undermining the national morality by yielding to the temptation to spoliation. The Chemical Foundation transaction, and other "sales" of sequestrated property amounting to practical confiscation, were undertaken after the armistice, when confiscation of enemy property, just as killing the enemy, became internationally illegal. The consequences of war are often more harmful to civilized institutions than war itself. To the writer it has seemed that the apparent inability to resist the temptation to spoliate private property, now embodied in the Treaty of Versailles, is likely to prove one of the most costly of all modern retrogressive innovations. Perhaps the best way to check its effect as a precedent is to stipulate in treaties not merely that private property may not be confiscated, but that it may not even be sequestrated.

EDWIN M. BORCHARD.

THE NEW FRENCH CODE OF NATIONALITY

On August 10, 1927, a new law on nationality was promulgated in France. Like all important Acts of the French Parliament in these days, it was followed by a decree supplying the necessary details for its completion and execution. It was also accompanied by a circular of the Minister of Justice containing instructions to the prefects and *parquets* concerning the application of its provisions. Unlike the law of 1889 which it supersedes and which, for the most part, was incorporated in the Civil Code (Arts. 8–21), the new law was not inserted in the code but, like the nationality legislation of various other Continental European States, was proclaimed as a separate "code of nationality." It is composed of fifteen articles which deal in turn with the nationality of Frenchmen, *jure soli* and *jure sanguinis*, naturalization of aliens, the effect of marriage on the nationality of women, and the loss and recovery of nationality.

The general purpose of the new law was to remove certain defects in the law of 1889, to fill up the *lacunae* which it contained and to render it easier for aliens to acquire French nationality. The large influx of foreigners into France in recent years—the number is estimated to be actually more than

3,000,000—has tended to create a feeling among the French that the presence of so large a number of foreigners in the country involved certain inconveniences if not dangers, and that considerations of public policy required that an effort should be made to assimilate them as far as possible to the status of Frenchmen. This object could be facilitated by an amendment to the naturalization laws making easier the acquisition by aliens of French nationality. Curiously enough, French sentiment in this respect has recently undergone a striking change. When the law of 1889 was enacted it was criticized by many on the ground that it rendered too easy the naturalization of foreigners and thus opened the door to aliens who were little deserving of French nationality. But lately the trend of sentiment has been in the opposite direction, for the reason mentioned above.

The new law begins by abolishing the "authorization of domicile" which first appeared in the Code Napoleon, the purpose of which was to facilitate the enjoyment by aliens of their private rights. Desirable enough during the First Empire, its character had been transformed by the law of 1889 and its possession was no longer an advantage to the alien. In connection with the acquisition of nationality by birth the most notable innovation introduced by the new law is the provision that a child born of French parents in a foreign country whose law imposes, *jure soli*, its own nationality on the child, shall henceforth be considered as having the nationality of such country. Under the Code Napoleon and the law of 1889 children born anywhere abroad of French parents were regarded as having French nationality unless they lost it, for example, by serving in the army of the country where they were born. This provision of the new law will tend to reduce the number of cases of double nationality and consequently diminish controversies with states where the principle of *jus soli* prevails.

As has been said, the requirements for naturalization have been materially attenuated by the new law. In the first place, the age qualification is fixed at eighteen years. Formerly the law required the alien applicant to be *capable* and there was much controversy as to whether his capacity should be determined according to French law or according to the law of his own country. Hereafter, it will be determined according to French law, which means eighteen years of age, which is inferior to that generally required by the law of other countries. This rule is criticized in France because it is in contradiction with the fundamental principle of the Code Civil (Art. 3), which provides that civil capacity of foreigners shall be determined by their national law, and because it will tend to multiply the number of persons having two nationalities, since foreign states will refuse to recognize the validity of the naturalization of minors possessing their nationality.

In the second place, the period of residence required as a condition of naturalization is reduced from ten years, which was the normal period required under the old law (though in exceptional cases three years' and even one year's residence sufficed), to three years. In numerous cases, only one

year is required, for example, if the applicant has rendered "important services to France," brought "distinguished talents" to the country, introduced industrial establishments or agricultural exploitations, or served in the French or allied armies, received a diploma from a French faculty or married a French woman. Finally, in certain cases all that is required is that the applicant shall have a fixed domicile in France. It should be said, however, that these marked relaxations from the rigor of the old requirements have provoked some criticism among certain French newspapers.

The law of 1889, passed while the scandal of the General MacAdras affair was still fresh in French memories, had enacted that henceforth no naturalized Frenchman should be eligible to a seat in Parliament within ten years after his naturalization. The new law extends this disability by providing that no such person shall be eligible to "any office or elective mandate" during the ten years following his naturalization, unless he has served in the French army or unless, for exceptional reasons, the disability is removed by a decree of the Minister of Justice.

The most important innovation introduced by the law of 1927 is that concerning the nationality of married women. It had been an ancient principle of French law that a married woman took, by the act of marriage, the nationality of her husband. The new law definitely abandons this principle. Following the example of Belgium, Brazil, Chile, Egypt, Roumania, the United States, and the Scandinavian countries, and responding to the demand of the women of France (although they lacked the influence which possession of the suffrage carries), the new law permits a French woman married to a foreigner to retain her French nationality. The existing law already allowed this in case she married a foreigner whose national law did not permit her to take his nationality. This saved French women in such cases from becoming stateless. The new law provides, moreover, that a foreign woman marrying a Frenchman does not thereby acquire the nationality of her husband, unless the woman expressly declares her desire to become French and fulfills certain formalities, or except where the law of her own country enacts that she shall take the nationality of her husband. These exceptions distinguish the French law on this point from the Cable Act, which allows the foreign woman marrying an American citizen no option in the matter. The second exception has the merit of saving the woman from the plight of statelessness, such as is the condition, for example, of an English woman who, since the enactment of the Cable Act, marries an American citizen. It is hardly necessary to say that, unlike the Cable Act, the French law makes no distinction between French women who marry Orientals and those who marry husbands of other races, denationalizing the one and preserving the citizenship of the others. By the terms of the new law, naturalization of the husband does not *ipso facto* naturalize the wife and major children, although it naturalizes the minor children if unmarried. The wife and major children may, however, be naturalized without the residence require-

ment, provided they possess the other qualifications required of the head of the family.

The abandonment by the law of 1927 of the old principle of the identity of the husband and wife and the recognition of the new principle that they may possess separate nationalities, has aroused much criticism in France, as the passing of the Cable Act did in the United States. Professor Jules Valery, eminent jurist and professor in the University of Montpellier says of it: "This rupture with the traditions and teachings of the past appears to me to be deplorable." [1] It is, he says, objectionable, first, on political grounds because under it, women retaining their French nationality but having husbands of foreign nationality, may occupy important places in the administrative, railway, postal and other public services and thus facilitate the acquisition by their foreign husbands of information relative to the internal and external safety of the state. Conversely, there will be, or may be, members of Parliament and high functionaries in the administrative service having wives who are nationals of other countries. In the second place, the law is objectionable on grounds of *ordre privé*, for the reason that a division of nationality in the family will raise serious difficulties in respect to inheritance, the civil rights of the spouses and the matter of divorce. The difficulties will be particularly notable in the matter of divorce. In certain countries, such as Italy and Spain, the principle of the indissolubility of the marriage relation is established and divorce is not permitted by law. It is equally an established principle of French and Continental law generally that the civil status of persons is determined by their own national law. Consequently a foreigner cannot obtain a dissolution of the marital relation unless the law of his or her own country admits divorce. Under the new law, therefore, the Italian or Spanish spouse of a person of French nationality would be unable to obtain a divorce in France, although the French party would be. The right of the one spouse to have the marital relation dissolved and the disability of the other may result in flagrant injustice.

The new law is criticized for other reasons. Nevertheless, the general principle that a woman shall not be automatically deprived of her nationality against her will by the act of marriage to a foreigner, when marriage produces no such consequence to the male citizen, whatever may be the inconveniences flowing from the division of the family in respect to nationality, seems destined to be generally adopted throughout the world. Certain of the inconveniences and disadvantages can be eliminated by international agreement, and it is to be hoped that the proposed conference on codification of international law will be able to find a solution which will be acceptable to the community of states generally.

J. W. GARNER.

[1] *La Nationalité Française, Commentaire de la Loi du 10 Août 1927*, p. 13. This monograph contains an illuminating analysis of and commentary on the new French Nationality Law. It is published by Pichon et Durand—Auzias, Paris, 1927, pp. 88.

THE MAVROMMATIS CASE ON READAPTATION OF THE JERUSALEM CONCESSIONS

In order to understand the full purport of the decision of the Permanent Court of the International Justice on the readaptation of the Mavrommatis Jerusalem concessions (Judgment No. 10, October 10, 1927) it is necessary to recur to the court's previous judgments. The grant of the conflicting Rutenberg concession in 1921 was held, in Judgment No. 5, to be contrary to the obligations contracted by the British Government as mandatory for Palestine under Protocol XII of the Treaty of Lausanne in conjunction with Article 11 of the mandate. The question then remained whether Mavrommatis had suffered loss entitling him to compensation. The Greek Government maintained that the execution of the concessions had already been rendered impossible by the grant of the Rutenberg concession. The court held, however, that while the Mavrommatis concession was valid, and one for which Great Britain as mandatory was bound to ensure respect under Article 11 of the mandate, it was not liable for compensation, but was obliged under the protocol to grant a "readaptation" of the concession to the new economic conditions prevailing since the war (Judgment No. 5, p. 51).

In accordance with this decision, Mavrommatis received a new concessionary contract on February 25, 1926, as a readaptation of his previous concession. The British Government, through the High Commissioner, undertook to approve, not later than August, 1926, the plans deposited in May, 1926, but did not in fact do so until December. The Greek Government claimed that by reason of this delay and by the hostility displayed by certain British authorities due to the action of the competing concessionaire, "it was rendered materially and morally impossible for M. Mavrommatis to obtain the financing of his concessions and that he has thus unjustly suffered damage" (Judgment No. 10, p. 6).

Under the new contract, Mavrommatis had been obliged to surrender "absolutely and irrevocably" all rights and benefits under the concession of 1914. He undertook to form companies for carrying out the new concessions and to obtain subscriptions for fixed portions of the share capital and to submit plans for the works which the High Commissioner was to approve or disapprove within three months. The receipt of the plans was acknowledged May 5th and therefore it was claimed that they should have been acted on by August 5th. In the meantime, Mavrommatis was notified that his assignment of the concessions to Lord Gisborough was deemed unwarranted by the terms of the concessions and he thereupon terminated the agreement with the assignee and requested the High Commissioner (September 4, 1926) to regard the plans as deposited on his, Mavrommatis', behalf. The plans were not approved until September 23rd and December 2nd, 1926, respectively, and the ensuing damage was charged against the British Government (Judgment No. 10, pp. 10–12).

The question in issue was whether the terms of the new concessions were

violated by Great Britain; because, if they were, the readaptation decreed by Judgment No. 5 had never been accomplished and the international obligations assumed by the mandatory under Article 11 had not been complied with (p. 12). The court considered only the question of its jurisdiction, and the merits were not involved.

Article 11 of the mandate provides in part as follows:

> The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein.

The jurisdiction of the court is predicated under Article 26 of the mandate which contains the following:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Reading these texts together, the jurisdiction of the court would seem to be fairly contemplated; yet the court held that it was concluded by its previous decisions to take jurisdiction only if "the facts alleged by the Greek Government in support of its claim constitute an exercise of the 'full power to provide for . . . public control' under Article 11 of the Mandate" (p. 19). The court under its previous decision held that the grant of a competing concession constitutes an exercise of "public control" as these words are used in the mandate. On the other hand, it was held that the right reserved in a grant of a concession for a public utility "to exercise powers of advice and supervision" either by the authorities of government, or by means of administrative regulations, does *not* come within the conception of "public control" (p. 17). A claim had indeed been made by the later concessionaire, Rutenberg, that the readapted concession of Mavrommatis was competing in regard to the use of the waters of the river El-Audja, but as the court determined that there was in fact no incompatibility, the acts complained of were held not to come within the category of an exercise of "public control," but only of the power reserved for "advice and supervision." While an international tribunal will ordinarily construe strictly the clauses upon which its jurisdiction is based, the reasoning seems somewhat strained when it is observed that the clause referring to "public ownership and control" is a specific grant of power and is preceded in both the English and the French texts by the *general* reservation: "subject to any international obligations accepted by the Mandatory."

Even assuming that the interpretation as to the court's jurisdiction is a logical result of the reasoning in Judgments Nos. 2 and 5, there is still another ground upon which the court might reasonably have assumed jurisdiction. If the alleged breach were under consideration for the first time, a different question would have been presented. But the alleged breach concerned and placed in issue *the completion of the readaptation ordered by Judgment No. 5.* In other words, the refusal to take jurisdiction seems to have rendered futile the carefully considered judgments rendered on the previous submissions. Let us analyze the results reached. The court has held that Great Britain had violated its international obligations in respect to the Mavrommatis concessions in certain particulars (Judgment No. 5). The court was properly seized of jurisdiction to so decree (Judgment No. 2). The proper remedy was held to consist in a readaptation of the concession thus violated (Judgment No. 5). In consideration of such readaptation, the concessionaire was compelled to surrender all rights under the earlier concessions. *And yet* the mandatory, by failing to take the necessary steps to make the new concession definite, could annul both the old and the new concession without right of redress through the Permanent Court (Judgment No. 10). As Judge Nyholm puts it in his dissenting opinion: "It follows that by the choice of his *own line of action*, a Mandatory may abolish the jurisdiction of the Court, an inadmissible proposition" (p. 31). An American lawyer might say that under the principles of novation, the redress to which the concessionaire was concededly entitled under the old contract could not be deemed accomplished until the new concession came definitely into effect.

It should be noted that of the judges who constituted the majority of the court in Judgment No. 10, Lord Finlay, Judge Moore and Judge Oda, having dissented from Judgment No. 2, were opposed to the assumption of jurisdiction by the court from the beginning. Judges Nyholm, Altamira and Caloyanni (the national judge) dissented from the present judgment.

The importance of the decision lies not so much in the questions of private rights which were involved (the claim exceeded an equivalent of one million dollars), but in the seeming emasculation of the control which it was believed the Permanent Court would possess over the exercise of the mandate. The jurisdiction in respect to the interpretation and application of the mandate, which many believed to be *general* in scope, subject to specific exceptions, now appears to be available only *as an exception.*

ARTHUR K. KUHN.

INTERNATIONAL PROTECTION OF PROPERTY IN NEWS

For some years efforts have been made to secure international legislation for the protection of a so-called "property in news." The national legislation of several countries is often referred to as having recognized the existence

of such a property right.[1] In South Australia, for instance, a statute of 1872 purported "to secure, in certain cases, the right of property in telegraphic messages" received "from any place outside the Australian colonies"; and this statute seems to have served as a model for legislation enacted in other British possessions. Elsewhere, legislation forbids the reproduction of published news within a certain interval after its original publication. Such legislation has been recently enacted in Bulgaria, Finland, Iceland and Russia. A recent Italian law restricts the publication of news and news items by requiring an indication of the source in each case. In some countries, the publishers of news must find their protection in the general copyright law.

In the United States, the recognition of a "property in news" was long advocated by Mr. Melville E. Stone, a director of the Associated Press.[2] Most of the cases relied upon in support of this thesis fall short of sustaining it, though the "ticker" cases,[3] and cases on race-results [4] may be thought to furnish some support for it. It is only to a limited extent that the publishers of news are protected by the American law of copyright.[5] The issue presented to the Supreme Court of the United States in International News Service *v.* Associated Press,[6] was quite clearly one of unfair competition, and did not call for a decision as to property in news. The International News Service was enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins, or papers purchased by it in the open market), merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members, or because it did not reveal the source from which it was acquired. The fullest discussion of the question of property in news was in the dissenting opinion of Brandeis, J., who reached the conclusion that the courts were not the proper agencies to define the protection which should be accorded.

The problem of devising adequate protection for news gatherers and news publishers also has an international aspect. News often relates to what is happening in other countries. It may be gathered in one country, published in a second, and protection may be sought against its premature publication

[1] The legislation of various countries is reproduced in League of Nations Document, C. 352, M. 126, 1927, pp. 17–28.

[2] To this end, two large volumes, entitled The Law of the Associated Press, were published in New York in 1919.

[3] See, for example, Chicago Board of Trade *v.* Christie Grain & Stock Co. (1905), 198 U. S. 236; Hunt *v.* N. Y. Cotton Exchange (1907), 205 U. S. 323; National Tel. News Co. *v.* Western Union Tel. Co. (1902), 119 Fed. 294; Chicago Board of Trade *v.* Tucker (1915), 221 Fed. 305.

[4] Exchange Tel. Co., Ltd. *v.* Central News, Ltd. [1897], 2 Ch. 48.

[5] See Tribune Co. of Chicago *v.* Associated Press (1900), 116 Fed. 126; Chicago Record-Herald Co. *v.* Tribune Association (1921), 275 Fed. 797.

[6] (1918), 248 U. S. 205.

in a third. During the South African War, copyright of news published in London and cabled to Chicago was refused in the United States.[7] The larger news services in different countries have arrangements for the exchange of news gathered, and some of them operate as distributors in more than one country. For this reason various attempts have been made at international conferences to secure some kind of protection for property in news. The subject was considered at length at the Paris conference on protection of literary and artistic property in 1896; but both the Berne Convention of September 9, 1886, and the additional act of May 4, 1896, expressly exclude from the protection accorded to articles in journals and reviews, *nouvelles du jour*. In the revision of the Berne Convention made at Berlin, November 13, 1908, it was more specifically provided (Art. 9) that "the protection of the present convention does not apply to *nouvelles du jour ou aux divers* which have the character of simple press information." [8] When the convention on the protection of industrial property was revised at The Hague in 1925, new provisions were added which may be applied to cover the protection of news publishers to the extent that interference with their enjoyment of the fruits of their effort may be found to be unfair competition. The revised article (10 *bis*) reads: [9]

> The contracting states are bound to assure the *ressortisants de l'Union* effective protection against unfair competition (*la concurrence déloyale*).
>
> Any act of competition contrary to honest practices in industrial or commercial relations shall constitute an act of unfair competition.
>
> Especially (*notamment*) the following are forbidden:
>
> 1. Any action of such a nature as to create confusion of any sort with the products of a competitor.
> 2. False allegations, in carrying on trade, of such a nature as to discredit the products of a competitor.

In 1925, the Assembly of the League of Nations envisaged a conference of press experts "to discuss all technical problems, the solution of which, in the opinion of experts, would be conducive to the tranquilisation of public opinion in various countries." Three preliminary meetings were held, a meeting of news agency representatives in August, 1926, a meeting of directors of press bureaux in October, 1926, and a meeting of journalists in January, 1927. These groups manifested a lively interest in the subject of property in news. The committee of news agency representatives thought it "desirable that endeavors should be made to secure an international understanding for the unification of legislation in the matter of property in news on the basis of the following principles: all news obtained by a newspaper or news agency, whatever its form or content and whatever the method by

[7] See Tribune Co. of Chicago *v.* Associated Press (1900), 116 Fed. 126.

[8] See the excellent study, "*La Convention de Berne et le Droit de Reproduction en matière de Journaux et de Publications Périodiques*," *Le Droit d'Auteur*, 1926, pp. 73–82.

[9] See *La Propriété Industrielle*, 1925, pp. 225–226.

which it has been transmitted, shall be regarded as the property of such newspaper or agency for as long as it retains its commercial value." The committee of journalists expressed a "strong hope that a solution may be found by the unification of legislation on literary and journalistic property." A draft law was elaborated by the Secretariat of the League of Nations during the summer of 1927,[10] and placed before the Conference of Press Experts which assembled in Geneva on August 24, 1927. The object of this draft was "to ensure that the news agency and the newspaper shall reap the full advantage of their efforts, their initiative and their expenditure for the purpose of obtaining news." To this end, it was proposed to be agreed that "agencies, newspapers and undertakings established for the purpose of collecting and distributing news have a temporary right in such news," the term "news" being defined to include "information of any kind the value of which depends on its novelty and not on the form in which it is presented." Free reproduction was provided for only "if within . . . hours after receipt, the news has become public property in any given place." The draft submitted was "based on the conception of protection afforded by national law" uniform in various countries, but it was contemplated also that the problem "might be solved by an international convention."

When this draft came before the Conference of Experts, a sharp difference of opinion developed among the members of the conference. The Secretariat draft was not considered in great detail, for the discussion was largely confined to the general principle involved in "property in news." At the end of its deliberations, the conference adopted the following resolution:[11]

> The Conference of Press Experts lays down as a fundamental principle that the publication of a piece of news is legitimate, subject to the condition that the news in question has reached the person who publishes it by regular and unobjectionable means, and not by an act of unfair competition. No one may acquire the right of suppressing news of public interest.
>
> (a) Unpublished News.
>
> The Conference is of opinion that full protection should be granted to unpublished news or news in course of transmission or publication in those countries in which such protection does not already exist.
>
> It shall be illegal for any unauthorized person to receive for publication or to use in any way for the purpose of distribution through the press, through broadcasting, or in any similar manner information destined for publication by the press or through broadcasting. . . .
>
> (b) Published News.
>
> In view of the widely differing conditions obtaining in various countries, the Conference is of opinion that the question of the protection of published news, whether reproduced in the press or by broadcasting, is one for the decision of the respective Governments concerned, and recommends that any Government to whom application in this respect

[10] See League of Nations Document, C. 352, M. 126, 1927.

[11] League of Nations Document, Conf. E. P. 13, General, 1927, 15.

is made by its country's press should sympathetically consider the advisability of granting suitable protection.

Such protection should, however, permit the reproduction of news within a specified period, subject to acknowledgment and payment.

The Conference affirms the principle that newspapers, news agencies, and other news organizations are entitled after publication as well as before publication, to the reward of their labour, enterprise and financial expenditure upon the production of news reports, but holds that this principle shall not be so interpreted as to result in the creation or the encouragement of any monopoly in news.

In order to realise these principles, it is desirable that there should be international agreement and that the Council of the League of Nations, by resolution, should request the various Governments to give immediate consideration to the question involved.

The adoption of this resolution signalizes the failure, for the time being, of the efforts to secure an international recognition of property in news. In view of the careful preparation of the subject, an early renewal of such efforts seems improbable. The provisions in Article 10 *bis* of the convention for the protection of industrial property would now seem to afford a more substantial basis for securing adequate protection to publishers of news.[12]

The history of the insistence on international protection of property in news is chiefly interesting because of the light thrown on the process of international legislation. It shows quite clearly the futility of attempting to regulate by international action those activities which present national as well as international problems, but as to which thought in many countries has not become crystallized.

MANLEY O. HUDSON.

[12] For later action by the Council and Assembly of the League of Nations concerning the report of the Conference of Press Experts, see League of Nations Official Journal, 1927, pp. 1103–1108, and *ibid.*, Spec. Supp. No. 53, p. 34. See, also, League of Nations Document, C. L. 20, 1928.

CURRENT NOTES

Third Conference of Teachers of International Law. The program of the Third Conference of Teachers of International Law to be held in Washington April 25–26, 1928, has been issued. The sessions will be held in the Assembly Hall of the Carnegie Institution, 16th and P Streets, Northwest, Washington, D. C. The Conference will open on Wednesday, April 25, at two o'clock p. m. under the presidency of Professor Edwin D. Dickinson, of the University of Michigan, Director of the Conference. Dr. James Brown Scott, Director of the Division of International Law of the Carnegie Endowment for International Peace, upon whose invitation the Conference is being held, will make a few remarks of welcome, and reports will be submitted by Professor Ellery C. Stowell of the American University, Chairman of the Committee on Permanent Organization, and Professor Edwin M. Borchard, Yale University Law School, Chairman of the Committee on Publications. The second session will be held at eight thirty o'clock p. m. on the 25th, with Professor William I. Hull, of Swarthmore College, presiding. The subject of discussion will be "The aim and scope of courses in international law in the colleges, the graduate schools, and the law schools." A round table conference on problems of instruction in international law will start on Thursday morning, April 26, at ten o'clock, with Professor Frederick A. Middlebush, University of Missouri, presiding. The subject will be "The distribution of international law among the laws of peace, war, and neutrality, and the relative emphasis upon each in college, graduate, and law school courses." The round table conference will be continued on Thursday afternoon at two o'clock, with Professor John H. Latané, of Johns Hopkins University, presiding. The subject will be "The facilities for the study of international law and the integration of research in international law with investigations in related subjects, such as history, geography, economics, international politics, and international organization. Are functional studies feasible?" At the close of the round table discussions the conference will consider committee reports on new proposals and then adjourn. About one hundred teachers of international law, representing all sections of the country, are expected to be in attendance. The proceedings will be later printed and distributed to libraries and interested teachers.

Fellowships in International Law. The Division of International Law of the Carnegie Endowment for International Peace has announced the following awards of Fellowships in International Law for the academic year 1928–1929:

Teacher Appointments: Ralph Ebner Himstead, M.A., J.D., Syracuse University; Vangala Shiva Ram, M.A., Ph.D., Lucknow University; Harold Hance Sprout, M.A., University of Wisconsin; Dennis Dewitt Brane, M.A., Western Reserve University.

Student Appointments: John Brown Mason, M.A., University of Wisconsin (renewal); David Walter Wainhouse, M.A., LL.B., Tufts College (renewal); Allister H. G. Grosart, A.B., University of Toronto; Telemachos John Maktos, LL.B., Oxford University; Ruth Elizabeth Bacon, A.B., Radcliffe College; Lora Lucile Deere, A.B., University of Illinois; Erwin Edward Reynolds, A.B., Harvard University; Charles Keith Uren, A.B., University of Michigan.

A special research fellowship has been awarded to Dr. Camilo Barcía Trelles, of the University of Vallodolid, Spain, for a year's research in the United States in the subject of the Monroe Doctrine.

The Hague Academy of International Law has announced its program of lectures for the coming summer session. The session is divided into two terms, the first one opening on July 2 and closing July 28, the second lasting from August 2 to August 25. The program of each term is arranged so as to be complete in itself and yet without duplicating lectures in the other term, thus accommodating students who can attend for only a single term as well as those who desire to spend the two months at the Academy. The lectures, which are given in the French language, are intended for all who have already some acquaintance with international law and wish to improve it either through professional interest or considerations of intellectual culture. The instruction is entirely gratuitous, and anyone desiring to follow the course has but to address to the Secretariat of the Administrative Council of the Academy, the Peace Palace, The Hague, a request for admission, indicating his full name, nationality, occupation and address.

Journal of Abstracts in the Social Sciences. The Social Science Research Council announces plans to establish a *Journal of Abstracts in the Social Sciences*, to contain complete citations and short but objective abstracts of important new materials appearing in the books, pamphlets and reports, and in the many periodicals, both scientific and semi-scientific, published in the United States and abroad. The publication of these abstracts is designed to save duplication of effort, to apprise workers of the existence of other specialists, and to stimulate correspondence between them. It will call attention to new methods of research, serve as a permanent record of the work already accomplished, and promote the development of the sciences to which it relates. An organizing committee has been appointed, with a number of advisory committees in the several sciences who have been asked to suggest (1) the names of scholars who may be considered for the position of salaried editors and unsalaried consulting editors; and (2) to draw up a scheme of classification adequate to the needs of the systematic grouping of materials from their respective fields of specialization within the social sciences. Dr. F. Stuart Chapin, Professor of Sociology in the University of Minnesota, is chairman of the Organizing Committee.

Institute of International Relations. A Northwest Session of the Institute of International Relations will be held at the University of Washington,

Seattle, July 22–27, 1928. While the interest of the Institute is in general international affairs, the forthcoming conference will stress the problems of the Pacific and the Orient, relations with Great Britain, and problems in international education, international organization, international commerce, and finance. An invitation to membership is extended to those whose interest and experience enable them to contribute to and profit from the round table discussions. Universities, colleges, learned societies, labor groups, civic organizations, religious bodies, clubs, business and professional organizations, are invited to send delegates. A registration fee of ten dollars will be charged each member and delegate, which entitles him to attend all sessions of the conference. College and university student membership is five dollars. Further information may be obtained from the Executive Secretary, Dean Charles E. Martin, University of Washington, Seattle, Washington.

Institut Universitaire de Hautes Etudes Internationales. The Postgraduate Institute of International Studies, founded at Geneva in 1927, announces the opening of its academic year on October 22, 1928, and to continue until July, 1929. The Institute aims to provide a permanent postgraduate school of international studies at the seat of the League of Nations, and instruction is being given in political, legal, economic, and social subjects of an international character. It is governed by an executive council composed of Messrs. William Rappard, Rector of the University of Geneva; Vernon Kellogg, Permanent Secretary of the National Research Council at Washington; Osten Unden, Professor at the University of Upsala; the President of the Department of Public Education in the Canton of Geneva; and the Minister of the Interior of the Swiss Confederation. Besides a regular staff of professors, visiting lecturers are provided from different countries. The lectures are given in French or English. The Institute will admit applicants in possession of university degrees which are approximately equal in value to a *Licence* of the University of Geneva, but applicants who have no university degrees but are qualified by their professional experience, may be admitted by the Director. Further information may be obtained from the Secretary, the Postgraduate Institute of International Studies, 5, Promenade du Pin, Geneva, Switzerland.

The International Colonial Institute. The International Colonial Institute, founded in 1894, announces the resumption of its publications containing legal, administrative, political, social and economic data relating to the principal types of colonies in the entire world, consisting of several volumes a year, and, at more or less regular intervals, of monographs dealing with important problems engaging the attention of colonial circles. The following works are in course of preparation: (a) a comparative study of native representative Councils; (b) a study of the regulations affecting native labor; and (c) a study of the intensive development of native cultivation. Subscriptions to the publications of the Institute, dating from January 1, 1928,

are at the rate of 100 gold francs per annum, or its equivalent in foreign money. Subscriptions may be placed with the International Colonial Institute, 34 Rue de Stassart, Brussels, Belgium.

Settlement of the Nanking Incident.[1] An agreement has been concluded at Shanghai between the American Minister, Mr. J. V. A. MacMurray, and General Huang Fu, Minister of Foreign Affairs of the Nationalist Government at Nanking. The agreement is made in the form of three notes addressed by Huang Fu to the American Minister and three replies from the latter.

In the first note the Nationalist Government expresses its profound regret for the indignities to the American flag and to official representatives of the United States, for the loss of property sustained by the American Consulate, and for the personal injuries and material damages done to American residents at Nanking. The Nationalist Government affirms that after investigation it has been found that these occurrences were instigated by the Communists prior to the establishment of the Nationalist Government at Nanking, but that the Nationalist Government accepts the responsibility therefor. It affirms further that the Nationalist Government has issued orders for the protection of the lives and property of Americans in China and it undertakes that there will be no similar violence or agitation against American lives or legitimate interests. It declares that the troops of the Division which took part in the incident have been disbanded and that it has taken steps for the punishment of the soldiers and other persons implicated. It undertakes to make compensation in full for personal injuries and material damage done to the American Consulate, American officials and American residents and property at Nanking. For this purpose it proposes that there be created a Sino-American joint commission to verify the injuries and damages to assess the amount of compensation due in each case. In reply, the American Minister accepts these terms in definite settlement of the questions arising out of the incident and affirms that the American Government looks to the loyal fulfillment of these terms of settlement as affording the measure of the good faith and good will with which it may anticipate being met by the Nanking authorities.

In the second note the Nationalist Minister for Foreign Affairs refers to the firing by American naval vessels into Nanking on March 24, 1927, expressing the hope that the American Government would indicate regret at that action. In reply, the American Minister states that the firing was confined to a protective barrage laid around the house in which the American Consul and other Americans had taken refuge from attacks by Chinese soldiery, that it provided the only conceivable means by which the lives of that party could be saved and it made possible the evacuation of other Americans in Nanking whose lives were in actual danger; the American Government feels that its naval vessels had no alternative, though it deeply

[1] State Dept. press notice, April 2, 1928.

deplores that circumstances beyond its control should have necessitated the adoption of such measures for the protection of the lives of its citizens.

In the third note, the Nationalist Minister for Foreign Affairs expressed the hope of the Nanking Government that further steps might be taken for the revision of the existing treaties and the readjustment of outstanding questions. The American Minister replies that the question of treaty revision can scarcely be considered germane to that of amends for the Nanking incident, but that, as has been manifest from the course of action consistently pursued by the American Government and from the statement made by the Secretary of State on January 27, 1927, the Government and people of the United States are sympathetically disposed toward the aspirations of the Chinese people for the realization of China's unrestricted sovereignty, and that the American Government hopes that political progress made in China may from time to time afford opportunities for revision of treaty stipulations which may have become unnecessary or inappropriate. The American Government looks forward to the hope that there may be developed in China an effective administration representative of the Chinese people.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1927–FEBRUARY 15, 1928

(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de l'Institut Intermédiaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *R. D. I.*, Revue de Droit International; *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *U. S. C. R.*, U. S. Commerce reports.

July, 1927

27 HAITI—ITALY. Commercial convention signed Jan. 3, 1927, ratified and promulgated in Haiti. *U. S. C. R.*, Jan. 2, 1928, p. 49.

August, 1927

5 ITALY—SWITZERLAND. Exchanged ratifications of convention for navigation on Lake Maggiore and Lake Lugano, signed Oct. 22, 1923. Text: *R. D. I. (Rome)*, 1927, p. 582.

11 PORTUGAL—SPAIN. Convention signed at Lisbon on utilization of hydro-electric power of the Duero River. Text: *R. D. I. (Paris)*, Oct.–Dec., 1927, p. 1059.

20 COLOMBIA—SWITZERLAND. Signed treaty of conciliation and arbitration at Berne. Text: *R. G. D. I. P.*, 1927, p. 847.

23 *to Sept. 2* COMMUNICATIONS AND TRAFFIC CONFERENCE. Held at Geneva. Resolutions. *L. N. O. J.*, Oct.–Nov., 1927, pp. 1129 and 1598.

31 FRANCE—GREAT BRITAIN. Agreement of Aug. 18, 1927, regarding administration of the New Hebrides, confirmed by exchange of notes. Text: *G. B. Treaty Series*, no. 28 (1927).

September, 1927

1–10 AIR MAIL CONFERENCE. International conference held at The Hague. *N. Y. Times*, Sept. 26, 1927, p. 26.

29 SWITZERLAND—TURKEY. Exchanged ratifications of most-favored-nation commercial treaty signed at Angora, May 4, 1927. *U. S. C. R.*, Feb. 6, 1928, p. 384.

October, 1927

12 IRISH FREE STATE—PORTUGAL. Treaty of commerce and navigation between Portugal and Great Britain signed Aug. 12, 1914, denounced by Irish Free State. *U. S. C. R.*, Jan. 2, 1928, p. 49.

19 BRAZIL—VENEZUELA. Exchanged ratifications of convention on internal political uprisings, signed April 13, 1926. *P. A. U.*, March, 1928, p. 311.

19 BULGARIA—GREECE. Temporary most-favored-nation agreement signed in Athens, Feb. 2, 1927, came into force. *U. S. C. R.*, Jan. 2, 1928, p. 48.

19 *to Jan. 16, 1928* VILNA DISPUTE. Lithuania's protest to League of Nations over closing of Lithuanian schools in Vilna made public on Oct. 19. *C. S. Monitor*, Oct. 19, 1927, p. 6. *N. Y. Times*, Nov. 22, 1927, p. 13. Soviet Government presented note to Poland on Nov. 24 warning of danger presented by attack against independence of Lithuania. *Times* (London), Nov. 26, 1927, p. 14. Poland presented note to Powers on Nov. 28, and Lithuanian Prime Minister issued statement denying Lithuania's readiness to renounce Vilna. Texts: *E. E. P. S.*, Nov. 30, 1927, p. 178. *U. S. Daily*, Nov. 30, 1927. On Dec. 10, Council of the League adopted resolution setting forth declarations of Polish and Lithuanian representatives, that "state of war" existing between the two countries since 1920 is terminated, and recommending open, direct negotiations regarding other matters in dispute. *Times* (London), Dec. 12, 1927, p. 14. On Jan. 8–16 notes were exchanged regarding program and time of future negotiations. Text: *E. E. P. S.*, Jan. 31, 1928, p. 307.

22 NICARAGUA ELECTION. Statement handed to Chamorro by State Department denying his right to run again for president in 1929. Text: *U. S. Daily*, Oct. 24–25, 1927, p. 2.

November, 1927

1–5 CRIMINAL LAW. International conference for unification of penal law, met at Warsaw. Resolutions: *B. I. I. I.*, Jan., 1928, p. 140.

1 ITALY—SWITZERLAND. Protocol to commercial treaty of Jan. 27, 1923, signed Sept. 24, 1927, came into force after ratification by both countries. *U. S. C. R.*, Feb. 6, 1928, p. 384.

3 AFGHANISTAN—POLAND. Treaty of friendship signed at Angora. Text: *E. E. P. S.*, Feb. 15, 1928, p. 349.

3 GERMANY—POLAND. Signed provisional agreement regulating exports of logs and lumber from Poland to Germany for one year. *U. S. C. R.*, Jan. 9, 1928, p. 114.

5 CUBA—SPAIN. Commercial treaty signed July 15, 1927, came into force provisionally. Ratifications have since been exchanged. *U. S. C. R.*, Jan. 9, 1928, p. 113.

10 FINLAND—SWITZERLAND. Temporary most-favored-nation commercial treaty, signed June 24, 1927, came into force. *U. S. C. R.*, Jan. 2, 1928, p. 48.

11 FRANCE—SERBIA. Signed treaty of conciliation and judicial regulation at Paris. Text: *R. G. D. I. P.*, 1927, p. 854.

16–25 RADIOTELEGRAPH CONFERENCE. International conference, which opened on Oct. 4, adopted a code of regulations on Nov. 16, to provide system of control of international communications by radiotelegraph. Text: *U. S. Daily*, Nov. 17, 1927, p. 2. Signed convention on Nov. 25 on behalf of 80 nations to become effective Jan. 1, 1929. Address of Secretary Hoover: *U. S. Daily*, Nov. 26, 1927, p. 2. *N. Y. Times*, Dec. 4, 1927, *XI:* 20.

17 *to Jan. 11, 1928* MEXICAN OIL LAW. In decision handed down on Nov. 17 by Mexican Supreme Court in favor of the Mexican Petroleum Company, an American corporation, Articles 14 and 15 of the petroleum law of Dec. 26, 1925, were declared unconstitutional. *Cur. Hist.*, Jan., 1928, *27*: 578. *N. Y. Times*, Nov. 18–19, 1927, p. 1. *U. S. Daily*, Nov. 19, 1927, p. 1. Text in English: *Commercial law series*, Nov., 1927 (Division of Commercial laws, Dept. of Commerce). On Jan. 11, 1928, amendments to petroleum law, modifying Arts. 14 and 15, went into effect with their publication in *Diario Oficial* on Jan. 10. *N. Y. Times*, Jan. 12, 1928, p. 9.

Translation of Arts. 14–15, as in original law and as amended: *U. S. C. R.*, Jan. 30, 1928, p. 312. *Cur. Hist.*, Feb., 1928, *27*: 730.

21–26 BILLS OF EXCHANGE. Committee of legal experts on bills of exchange met at Geneva to consider summoning an international conference to bring into harmony continental laws on bills of exchange and checks. *L. N. M. S.*, Dec. 15, 1927, p. 333.

22 ALBANIA—ITALY. Signed treaty of defensive alliance in Rome on Nov. 24. *Times* (London), Nov. 25, 1927, p. 16. Text: *Europe*, Dec. 10, 1927, p. 1647. *E. E. P. S.*, Nov. 30, 1927, p. 173. *Cur. Hist.*, Feb., 1928, *27*: 752.

22 GREAT BRITAIN—PERSIA. Protest made to British Government by Persia against treaty concluded at Jeddah on May 20, 1927. Text: *E. E. P. S.*, Dec. 31, 1927, p. 247.

22 POLAND—UNITED STATES. Signed extradition treaty and protocol at Warsaw. *Cong. Rec.*, Feb. 24, 1928, p. 3640.

23–26 LEAGUE OF NATIONS ROAD TRAFFIC COMMITTEE. Held meeting at Geneva to consider proposals with regard to signs concerning safety of the road not provided for in the Paris International Convention of 1926, traffic signals, speed limit, licenses and taxes of motorists, etc. *L. N. M. S.*, Dec. 15, 1927, p. 334.

24 CHINA. Nanking Government announced abrogation of treaties or agreements in relation to China to which the Nationalist Government is not a party. *N. Y. Times*, Nov. 25, 1927, p. 5.

24 HAGUE CONFERENCE ON CODIFICATION OF INTERNATIONAL LAW. Secretary General of the League of Nations announced appointment of Preparatory Committee for the Conference in 1929. (Basdevant, Castro Ruiz, François, Hurst, Pilotti.) *L. N. Doc. C. 548. M. 196. 1927. V.*

25 CUBA—UNITED STATES. Agreement announced on transit charges for mails. *U. S. Daily*, Nov. 26, 1927, p. 1.

25 ESTONIA—GREECE. Exchanged ratifications of most-favored-nation commercial treaty signed Jan. 4, 1927. *U. S. C. R.*, Feb. 27, 1928, p. 585.

26 CANADA—CUBA. Trade agreement effective Nov. 25, 1927, announced by Canadian Minister of Finance. *U. S. C. R.*, Dec. 5, 1927, p. 631.

26 GERMANY—HAITI. Exchange of notes announced, according mutual most-favored-nation treatment to products of either nation. *U. S. C. R.*, Jan. 2, 1928, p. 48.

28 FRANCE—GERMANY. Agreement of Nov. 4 concerning prorogation of certain commercial agreements relative to Sarre Basin, came into force. *J. O.*, Dec. 4, 1927, p. 12239.

29 AFGHANISTAN—PERSIA. Security treaty signed in Kabul. *B. I. N.*, Dec. 10, 1927, p. 265.

30 FRANCE—GERMANY. Commercial agreement, reached by exchange of notes, relative to certain articles of merchandise, came into force. Text: *J. O.*, Dec. 4, 1927, p. 12238.

30 *to Dec. 8* LEAGUE OF NATIONS PREPARATORY COMMISSION FOR DISARMAMENT CONFERENCE. Fourth session held in Geneva, to examine resolutions of Assembly and Council on arbitration, security and disarmament and to consider progress of the work. Delegation of the Union of Socialist Soviet Republics deposited a program of disarmament. Committee on Arbitration and Security was constituted and drew up its program of work. *L. N. M. S.*, Jan. 15, 1928, p. 354. *U. S. Daily*, Nov. 8, 1927, p. 26. *L. N. Doc.* C. 667. M. 225. 1927. IX.

December 1927

1 GERMANY—GREAT BRITAIN. Exchanged ratifications at Berlin of agreement relating to air navigation, signed Berlin, June 29, 1927. *G. B. Treaty Series*, no. 1 (1928). *Cmd.* 3010.

1–2 LEAGUE OF NATIONS ARBITRATION AND SECURITY COMMISSION. Constituted by the Preparatory Commission on Disarmament Conference at its meeting Nov. 30, 1927, in accordance with a resolution of the Eighth Assembly. Held first session on Dec. 1–2, with all members of the Preparatory Commission represented, with exception of the United States. Soviet Russia was represented by an observer. *L. N. M. S.*, Jan. 15, 1928, p. 354. *L. N. Doc. C. A. S. 10 (Feb. 6, 1928); C. 667. M 225. 1927. IX.*

1 SOVIET DISARMAMENT PLAN. Presented to fourth session of Preparatory Committee for Disarmament Conference, by the delegation of the Union of Socialist Soviet Republics. Text: *L. N. Doc. C. 46. M. 231. 1928. IX. Arbitrator* (London), Jan., 1928, p. 7.

2 AUSTRIAN DISARMAMENT. Conference of Ambassadors decided that Liquidation Organ of Control should cease to function on Jan. 31, 1928. *B. I. N.*, Dec. 10, 1927, p. 12.

3 FRANCE—ITALY. Exchanged notes, providing for mutual guarantee of the position of their respective nationals in the country of the other. *N. Y. Times*, Dec. 4, 1927, p. 5. *B. I. N.*, Dec. 10, 1927.

5 GREECE—UNITED STATES. Funding of Greek debt agreed upon. *N. Y. Times*, Dec. 6, 1927, p. 31. *Times* (London), Dec. 7, 1927, p. 13.

5–12 LEAGUE OF NATIONS COUNCIL. Held 48th session to consider Vilna dispute between Lithuania and Poland over expulsion of Polish nationals on Lithuanian territory, minority and refugee problems, etc. *L. N. O. J.*, Feb., 1928. *L. N. M. S.*, Jan. 15, 1928, p. 344. *Times* (London), Dec. 13, 1927, p. 15.

7 FRANCE—GREECE. Signed agreement on war debt. *Times* (London), Dec. 8, 1927, p. 18.

7 HONDURAS—UNITED STATES. Treaty of friendship, commerce and consular rights signed to replace treaty of 1864. *U. S. Daily*, Dec. 13, 1927, p. 1. *Press notice*, Dec. 12, 1927. *P. A. U.*, March, 1928, p. 312.

7–16 PERMANENT COURT OF INTERNATIONAL JUSTICE. On Dec. 7, at opening of 12th session, M. Anzilotti (Italy) was elected President of the Court for 1928–1930, succeeding Dr. Huber; and M. Weiss (France) was elected Vice-President. On Nov. 21 and Dec. 16, judgments were given on request of German Government for interpretation of two previous judgments of the Court (nos. 7 and 8) relating to the taking over by Poland of the Chorzow nitrate plant. On Dec. 8, advisory opinion was pronounced on jurisdiction of European Commission of the Danube. *L. N. M. S.*, Jan. 15, 1928, p. 346. *Pub. of Court, Ser. A.* nos. 12–13, and Ser. B, no. 14.

9 LEAGUE OF NATIONS CONSULTATIVE COMMITTEE. Constituted by the Council. Includes experts on industry, commerce, agriculture, finance, labor, etc. *L. N. M. S.*, Jan. 15, 1928, p. 358.

11 FRANCE—GERMANY. Two declarations were promulgated in France, one relative to transmission of judicial acts and to the execution of rogatory commissions in civil and commercial matters; the other concerning exemption from guarantee or deposition in judicial matters signed Oct. 5, 1927. Text: *J. O.*, Dec. 14, 1927, p. 12571.

14 FINLAND—SWEDEN. Signed most-favored-nation commercial treaty at Stockholm. *U. S. C. R.*, Jan. 23, 1928, p. 247. *Cur. Hist.*, Mar., 1928, *27*: 908.

14 GREAT BRITAIN—IRAQ. Revised treaty regulating relations between the two countries signed at Colonial Office. Summary of articles: *Times* (London), Dec. 20–21, 1927, pp. 13 and 11. *Cmd.* 2998. Text: *E. E. P. S.*, Dec. 31, 1927, p. 236.

15–17 CHINA—RUSSIA. On Dec. 15, Chinese Nationalist Government notified Soviet officials of severance of diplomatic relations. Text of mandate and Soviet reply of Dec. 17: *China Weekly R.*, Dec. 24, 1927, p. 90. *Times* (London), Dec. 19, 1927, p. 12.

16 CODIFICATION OF INTERNATIONAL LAW. On Dec. 16, the State Department sent note to Secretariat of the League of Nations replying to its communication of June 7, 1927, stating that three questions of international law, recommended by the Committee on Codification of International Law were not approved for codification by the United States: (1) Communication of judicial and extra-judicial acts on penal matters; (2) Legal position and functions of consuls; (3) Revision of the classification of diplomatic agents. Text: *U. S. Daily*, Dec. 20, 1927, p. 1. On Dec. 28, the Department of State made public a note sent to League of Nations approving proposals to frame regulations on nationality, territorial waters, and responsibility for injury to person or property of foreigners. Text: *U. S. Daily*, Dec. 28, 1927, p. 1, 3.

16 GERMAN REPARATIONS. Agent General for Reparation Payments issued report for third year. Introduction contains details of correspondence between Agent General and the German Government, conducted in October and November, regarding German tendency toward expansion in public finance. Text of introduction and conclusions: *U. S. Daily*, Dec. 30–31, 1927, p. 7. Text of memorandum of Agent General and reply of German Government: International Conciliation, no. 237, Feb. 1928.

22 LATVIA—POLAND. Provisional most-favored-nation commercial agreement signed in Riga. *U. S. C. R.*, Feb. 20, 1928, p. 519.

23 GREAT BRITAIN—LATVIA. Commercial travelers' sample agreement signed Nov. 16, 1927, came into force. *U. S. C. R.*, Mar. 5, 1928, p. 648.

26 CHILE—SPAIN. Signed arbitration treaty. *C. S. Monitor*, Dec. 27, 1927, p. 1.

28 *to Feb. 6, 1928* FRANCE—UNITED STATES. On Dec. 28, Secretary Kellogg sent note to French Government respecting a "Draft and pact of perpetual friendship between France and the United States," proposed by Premier Briand in June, 1927; invited France to join with the United States in proposing a multilateral declaration on renunciation of war as an instrument of national policy, open to signature of all nations, instead of the bilateral pact originally suggested by Briand. Forwarded also a draft treaty to replace the Root arbitration treaty of 1908. Text: *U. S. Daily*, Jan. 4, 1928, p. 1. *N. Y. Times*, Jan. 4, 1928, p. 4. Exchange of notes took place Jan. 5, 11, and 21. Texts: *F. P. A. I. S.*, Feb. 17, 1928, p. 409. *U. S. Daily*, Jan. 9, 13, 24, 1928. On Feb. 6, France and the United States signed new arbitration treaty on 150th anniversary of first Franco-American alliance in 1778. Text: *U. S. Daily*, Feb. 9, 1928, p. 3. *Cong. Rec.*, Feb. 8, 1928, p. 2810. *Cur. Hist.*, March, 1928, *27*: 870–3. Supplement to this JOURNAL, p. 37.

28 MIXED ARBITRAL TRIBUNAL (Anglo-Turkish). Declared itself incompetent in the case of the claim of the Eastern Bank against the government for £86,000, said to have been lost through the closing of the bank's Baghdad branch during the war. *B. I. N.*, Jan. 7, 1928, p. 19.

31 GERMANY—MEXICO. Most-favored-nation commercial treaty prolonged until Dec. 31, 1928. *U. S. C. R.*, Feb. 6, 1928, p. 384.

January 1928

1 FRANCE—SAAR TERRITORY. Declaration concerning legal assistance, signed Dec. 14, 1927, came into force. Text: *J. O.*, Jan. 1, 1928, p. 20.

2 DENMARK—SPAIN. Trade and navigation convention signed in Madrid. *B. I. N.*, Jan. 21, 1928, p. 20. *U. S. C. R.*, Feb. 20, 1928, p. 519.

3 COLOMBIA—PERU. Pan American Union announced ratification of boundary treaty signed March, 1922. *U. S. Daily*, Jan. 4, 1928, p. 1.

6 GERMANY—SERBIA. Commercial treaty signed Oct. 6, 1927, came into force. *U. S. C. R.*, Mar. 12, 1928, p. 715.

11 BELGIUM—UNITED STATES. Exchanged ratifications of treaty to prevent illegal importation of intoxicating liquors, signed Dec. 9, 1925. *U. S. Daily*, Jan. 12, 1928, p. 1. *U. S. Treaty Series*, no. 759.

16 GERMANY. Conference of the Reich and the Federal States to discuss possibility of constitutional and administrative reform, opened in Berlin under presidency of Chancellor Marx. *Times* (London), Jan. 17, 1928, p. 14.

16 IMPERIAL WIRELESS AND CABLE CONFERENCE. Opened in London. *Times* (London), Jan. 17, 1928, p. 11.

16 *to Feb. 20* PAN AMERICAN CONFERENCE. Sixth International American Conference held at Havana, with delegates from the twenty-one republics. Summary of projects approved by the Conference: *Press notice*, Feb. 20, 1928. *U. S. Daily*, Jan. 17–Feb. 21 and 28, 1928. *Cur. Hist.*, March, 1928, *27*: 858.

17 GERMANY—GREAT BRITAIN. Signed agreement for exemption of shipping profits from double taxation. Text: *G. B. Treaty Series*, no. 3 (1928). *Cmd.* 3027.

21 FRANCE—SWITZERLAND. Signed commercial arrangement providing for reductions in French import duties on certain classes of Swiss goods. *U. S. C. R.*, Feb. 6, 1928, p. 384. *Europe*, Feb. 4, 1928, p. 146.

21 FRENCH WAR ARCHIVES. Decree published providing for establishment of a commission in the Foreign Office to be charged with publication of diplomatic documents relative to outbreak of the war. Composition of commission: *E. E. P. S.*, Jan. 31, 1928, p. 315.

26 CANADA—JAPAN. Decision for exchange of ministers announced. *B. I. N.*, Feb. 4, 1928, p. 375.

27 GREAT BRITAIN—PORTUGAL. Signed agreement for mutual recognition of load-line certificates. *G. B. Treaty Series*, no. 4 (1928). *Cmd.* 3033.

28 EGYPT—SWITZERLAND. Treaty of commerce signed. *B. I. N.*, Feb. 4, 1928, p. 377.

28 PRIVATE INTERNATIONAL LAW. Sixth conference on international civil law closed at The Hague. Delegates from 21 European countries and Japan. *Times* (London), Jan. 30, 1928, p. 11.

February, 1928

2 CZECHOSLOVAKIA—VATICAN. Modus vivendi signed and approved by the Pope. *Europe*, Feb. 18, 1928, p. 228.

3 STATE DEPARTMENT. Announced organization of a Division of Protocol, which will be in charge of the reception of ambassadors and ministers and of general diplomatic procedure. Text: *U. S. Daily*, Feb. 4, 1928, p. 3.

4 FASCISM ABROAD. Statute to govern activities of Fascisti living abroad issued by Premier Mussolini. *N. Y. Times*, Feb. 5, 1928, p. 12. Text: *E. E. P. S.*, Feb. 15, 1928, p. 352.

6 HAGUE CONFERENCE ON CODIFICATION OF INTERNATIONAL LAW. Preparatory committee of the League met at Geneva, and elected M. Basdevant, chairman. *L. N. News*, Feb., 1928, p. 9.

7 CANADA—UNITED STATES. Minutes of conference between members of Canadian Royal Commission on customs and excise and officers of the United States, in regard to smuggling conditions, held in Washington, Aug. 29–30, 1927, were made public. *Press notice*, Feb. 7, 1928.

9 FRANCE—SAAR TERRITORY. Convention signed on Jan. 20, 1928, relative to mutual aid to nationals, came into force. Text: *J. O.*, Feb. 12, 1928, p. 1726.

13 NETHERLANDS—UNITED STATES. Signed protocol interpretative of Art. I of peace treaty signed Dec. 18, 1913. *Cong. Rec.*, Feb. 24, 1928, p. 3640.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Madrid, Nov. 1, 1926.
Ratification: Paraguay, Aug. 27, 1927. *P. A. U.*, Jan., 1928, p. 99.

ARMS TRAFFIC CONVENTION. Geneva, June 17, 1925.
Ratification: Venezuela. Dec. 15, 1927. *P. A. U.*, March, 1928, p. 312.

ARMS TRAFFIC. Declaration regarding Ifni. Geneva, June 17, 1925.
Ratification: Venezuela. Dec. 15, 1927. *P. A. U.*, March, 1928, p. 312.

ARMS TRAFFIC. Final Act. Geneva, June 17, 1925.
Ratification: Venezuela. Dec. 15, 1927. *P. A. U.*, March, 1928, p. 312.

ARMS TRAFFIC. Protocol of signature. Geneva, June 17, 1925.
Ratification: Venezuela. Dec. 15, 1927. *P. A. U.*, March, 1928, p. 312.

ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.
Ratification: Venezuela. Dec. 15, 1927. *P. A. U.*, March, 1928, p. 312.

COPYRIGHT UNION. Revision, Berlin, Nov. 13, 1908. Protocol, Berne, Mar. 20, 1914.
Adhesion: Irish Free State. Oct. 21, 1927. *Droit d'Auteur*, Nov. 15, 1927, p. 125.

CURRENCY AND BANKING REFORM IN ESTHONIA. Protocol. Geneva, Dec. 10, 1926.
Ratification: Esthonia. May 10, 1927. *L. N. O. J.*, Nov., 1927, p. 1537.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.
Ratifications:
Norway. Sept. 10, 1927.
Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.
Ratification: Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratifications:
Norway. Sept. 10, 1927.
Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

GREEK REFUGEES. Protocol for further settlement. Geneva, Sept. 15, 1927.
Signature: Greece. *L. N. O. J.*, Nov., 1927, p. 1531.

HEALTH INSURANCE FOR AGRICULTURAL WORKERS. Geneva, June 15, 1927.
Ratification: Germany. *U. S. Daily*, Dec. 23, 1927, p. 12.

HEALTH INSURANCE OF WORKERS IN INDUSTRY AND COMMERCE AND HOUSEHOLD EMPLOYMENT. Geneva, June 15, 1927.
Ratification: Germany. *U. S. Daily*, Dec. 23, 1927, p. 12.

INSPECTION OF EMIGRANTS. Geneva, June 5, 1926.
Ratification (conditional): Great Britain. Aug. 27, 1927. *I. L. O. B.*, Nov. 15, 1927.

MATERNITY CONVENTION. Washington, Nov. 29, 1919.
Ratifications:
Germany. Aug. 31, 1927.
Serbia. Mar. 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification: Serbia. Mar. 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.
Ratification: Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.
Ratification: Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

OPEN DOOR (Integrity of China). Washington, Feb. 6, 1922.
Ratification: Mexico. Oct. 5, 1927. *P. A. U.*, Feb., 1928, p. 202.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Ratification: Austria. Nov. 25, 1927. *L. N. O. J.*, Dec. 1927, p. 1637.

PAN AMERICAN ARBITRATION. Santiago, May 3, 1923.
Ratification: Mexico. Oct. 5, 1927. *P. A. U.*, Feb., 1928, p. 203.

PAN AMERICAN SANITARY CODE. Habana, Nov. 14, 1924. Additional protocol, Lima, Oct. 17, 1927.
Ratification: United States. Feb. 24, 1928. *Cong. Rec.*, Feb. 24, 1928, p. 3639.

POSTAL CONVENTION AND PROTOCOL. Mexico, Nov. 9, 1926.
Ratification: Costa Rica. Sept. 27, 1927. *P. A. U.*, March, 1928, p. 312.

RADIO TELEGRAPH CONVENTION. London, July 5, 1912.
Ratification: Haiti. Oct. 3, 1927. *P. A. U.*, Feb., 1928, p. 202.

REPATRIATION OF SEAMEN. Geneva, June 23, 1926.
Ratification: Belgium. Sept. 29, 1927. *I. L. O. B.*, Nov. 15, 1927. *L. N. O. J.*, Nov., 1927, p. 1508.

SEAMEN'S ARTICLES OF AGREEMENT. Geneva, June 24, 1926.
Ratification: Belgium. Sept. 29, 1927. *I. L. O. B.*, Nov. 15, 1927. *L. N. O. J.*, Nov., 1927, p. 1508.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Ratification: Belgium. Sept. 23, 1927. *L. N. O. J.*, Nov., 1927, p. 1532.

TELEGRAPH. St. Petersburg, July 22, 1875. Revision, Paris, Oct. 29, 1925.
Ratification: Haiti. July 26, 1927. *P. A. U.*, Jan., 1928, p. 98.

TRADE RESTRICTIONS CONVENTION. Geneva, Nov. 8, 1927.
Signature: United States. Jan. 30, 1928. *U. S. Daily*, Jan. 31, 1928, p. 1. *U. S. C. R.*, Feb. 13, 1928, p. 455.

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.
Ratification: Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.
Ratifications:
Costa Rica. Sept. 27, 1927. *P. A. U.*, March, 1928, p. 312.
Mexico. Dec. 31, 1925.
Venezuela. May 31, 1927. *P. A. U.*, Jan., 1928, p. 98.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification: Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875.
Ratification deposited: Germany. Jan. 30, 1928. *J. O.*, Feb. 16, 1928, p. 1942.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Accession: Sierra Leone. Nov. 16, 1927. *L. N. O. J.*, Dec., 1927, p. 1637.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of treatment). Geneva, June 5, 1925.
Ratifications:
Belgium. Sept. 20, 1927.
Finland. Sept. 12, 1927.
India. Sept. 28, 1927.
Netherlands. Sept. 2, 1927.
Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratifications:
Belgium. Sept. 20, 1927.
Netherlands. Sept. 2, 1927.
Serbia. March 20, 1927. *I. L. O. B.*, Nov. 15, 1927.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.
Ratifications:
Irish Free State. Nov. 25, 1927.
Switzerland. Nov. 16, 1927. *L. N. O. J.*, Dec., 1927, p. 1637.
Belgium. Sept. 20, 1927.
Finland. Sept. 12, 1927.
India. Sept. 28, 1927.
Serbia. March 20, 1927. *I. L. O. B*, Nov., 15, 1927.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ARBITRAL TRIBUNAL INSTITUTED BY THE REPARATION COMMISSION AND THE GOVERNMENT OF THE UNITED STATES TO DECIDE THE CLAIM OF THE STANDARD OIL COMPANY TO CERTAIN TANKERS[1]

MAJORITY AWARD

Rendered at Paris, August 5, 1926

By an agreement of June 7, 1920, the Government of the United States and the Reparation Commission submitted to a tribunal of three arbitrators the claim of the Standard Oil Company to beneficial ownership in certain tankers belonging to a German company at Hamburg and flying the German flag, which were turned over to the Reparation Commission by the German Government under the provisions of the Treaty of Versailles.

The tribunal found that, except for an infinitesimal part, all the shares and debentures representing the capital of the German company were originally owned by the American company; that an attempted sale of its voting shares by the latter to a German national in February, 1917, when war was imminent between the two countries, was invalid because there had been no actual transfer of the shares in compliance with German law, and that therefore at the time of the coming into force of the Treaty of Versailles the American Company was still the owner of the whole of the shares of the German company.

By a majority decision, from which the American arbitrator dissented, the tribunal held that the ownership of the securities of the German company did not vest in the American company the beneficial ownership of the tankers, which it conceived to be a special kind of right distinct from the right of ownership of the securities and additional to it. It was held that neither the shareholders nor other creditors have any right to corporate assets other than to receive a share of the profits during the existence of the company and a proportional share of the assets after it is wound up; that the control of a corporation by certain shareholders is not equivalent to ownership of its property; that the right of shareholders to the income produced by the operation of the corporate assets does not make the shareholders beneficial owners of the said assets inasmuch as such profits belong to the shareholders only in so far as and when they are distributed; and that the right of sharing in the income when allotted, and in the division of assets when the company is dissolved, are so essentially the characteristic rights of shareholders that they cannot be held to constitute a distinct and added right of beneficial ownership in the corporate assets.

The company's claim for equitable financial reimbursement was also disallowed by the majority award because of the attempted sale of the shares to a German national in 1917, which the tribunal set aside by the strict application of German law, thus enabling the American company to submit its claim to the tribunal only by the application of strictly legal considerations; and secondly, because an investor in a foreign country must submit to the laws of that country and assume the risks incident to a state of war, and has no ground for complaint if he receives the same treatment as nationals of the country and of allied and associated nationals with regard to their property therein as provided by the treaty of peace.

PREAMBLE

Whereas,

It is fitting, before examining the question in any way, to recall the following facts and documents:

By Paragraph I of Annex III to Part VIII of the Treaty of Versailles, the German Government "on behalf of themselves and so as to bind all other persons interested, ceded to the Allied and Associated Governments,"

[1] Printed from text furnished through the courtesy of the Department of State. Headnote by the Managing Editor of the JOURNAL.

represented for the purpose by the Reparation Commission, "the property in all the German merchant ships which are of 1,600 tons gross and upwards."

The third paragraph of the same annex lays down that "the ships and boats mentioned in Paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation."

In execution of the above provisions, the German Government delivered to the Reparation Commission nine tankers (*Helios, Mannheim, Sirius, Niobe, Pawnee, Hera, Loki, Wotan* and *Wilhelm Riedemann*) which belonged to a company having its registered office at Hamburg and known as the *Deutsche Amerikanische Petroleum Gesellschaft*, hereinafter referred to as the D. A. P. G.

There was no doubt that, from the point of view of the German Government, the ships in question came under Annex III, seeing that they flew the German merchant flag and also belonged to a company which was indisputably German.

It must be pointed out at once that, subsequently, one of these vessels, the *Wilhelm A. Riedemann*, was recognized as not deliverable as a vessel under construction under Annex III and that three others, the *Helios*, *Mannheim* and *Sirius*, were sold by agreement between the parties.

The present arbitration is concerned with the tankers *Niobe*, *Pawnee*, *Hera*, *Loki* and *Wotan*, with the proceeds from their working and with the proceeds from the sale of the tankers *Helios*, *Mannheim* and *Sirius*.

In March, 1919, and subsequently, through the intermediary of the American delegations to the Peace Conference and to the Reparation Commission, the American Standard Oil Company of the State of New Jersey protested against the delivery to the Powers of the vessels in question, of which it claimed the ownership.

In support of this claim, the Standard Oil Company relied upon the fact that the D. A. P. G. had been created by it, with the help of capital supplied by it and employed for the construction of the vessels claimed. It explained that the capital of the D. A. P. G. was 60 million marks, divided into 9 million shares, 21 million share-warrants and 30 million debentures. It alleged that at the time of the coming into force of the Treaty of Versailles, it owned of this capital the whole of the shares and almost all the share-warrants and debentures, except for an infinitesimal part.

It concluded that it had a right of ownership in the disputed vessels of a special kind known as "beneficial ownership," which made it impossible to say that they were the property of German nationals in the meaning of Annex III.

It further invoked considerations of equity which, in its opinion, justified the return of these vessels.

As the Governments of the Principal Allied Powers represented on the Reparation Commission did not see fit to allow the claim of the Standard

Oil Company, a convention was concluded, after many discussions which will be mentioned later, on June 7, 1920, between the Reparation Commission represented by M. Dubois and Sir John Bradbury, and the United States Government, represented by Mr. Boyden.

Under this convention the disputed tankers were temporarily handed over to the Government of the United States of America on the understanding that they were to fly both the flag of that country and the interallied flag.

In order to settle the dispute, Article 1 of this convention provided for the constitution of an independent tribunal in the following form:

> *Paragraph 1:* If the United States has not on July 1, 1920, ratified the Peace Treaty and an American representative is not qualified and acting on the Commission, then the Standard Oil Company's claim shall, at the request of the United States or other interested Governments, be adjudicated by an independent tribunal to be agreed upon between the United States and the several Governments concerned so that all parties interested may be properly heard. The Reparation Commission and the United States pledge themselves to use their best efforts to arrange this tribunal without delay.

The problems to be submitted to this Tribunal were formulated as follows in Paragraphs F and G:

> *Paragraph F:* As soon as the Reparation Commission or Independent Tribunal mentioned in Paragraph 1 has declared its decision upon the claim of the Standard Oil Company, the United States will transfer tankers in accordance with such decision, it being agreed, however, that if Standard Oil Company makes good its claim to beneficial ownership of all or any of the tankers in question, then such tankers shall by the terms of the decision be awarded to that Company and transferred to the United States flag.
>
> *Paragraph G:* If Standard Oil Company fails to make good its claim to beneficial ownership of tankers, but is found to be entitled to financial reimbursement, then Standard Oil Company shall be entitled to liquidation of the award by transfer of tankers to a value equal to the award, the tankers to be valued by the Reparation Commission or Independent Tribunal in its award, and the particular tanker or tankers to be selected by the Standard Oil Company and accepted by the Company at the valuation aforesaid.

By a decision of October 14, 1921, the Reparation Commission proceeded, with the approval of the American unofficial delegate, to set up the Tribunal provided for in Paragraph 1 of the said agreement. It appointed as arbitrators: Colonel Hugh A. Bayne, attorney at the Supreme Court of the United States, and M. Jacques Lyon, *avocat à la Cour d'Appel de Paris.* Moreover, it was provided by this decision that in the event of disagreement between them a third arbitrator previously appointed for the purpose would become a member of the Tribunal and the decision of the majority of the members of the Tribunal thus constituted would be final.

The two arbitrators appointed by the decision of October 14, 1921, re-

ceived the memorials and heard the observations of the parties concerned, but, as they were unable to come to an agreement and had previously obtained a promise of coöperation from M. Erik Sjoeborg, former Sectional President of the Franco-German Mixed Arbitral Tribunal and Envoy Extraordinary and Minister Plenipotentiary of the King of Sweden, they requested the latter to join them on the Tribunal.

The Tribunal thus constituted proceeded to a further examination of the question. All the documents were submitted to the new arbitrator for examination.

M. Lyon and Colonel Bayne, acting respectively on behalf of the Reparation Commission and the American Government, waived any further hearing and the parties confined themselves to adding a short written note to their previous memorials, the arguments and conclusions of which they maintained.

Thus after various meetings in Paris for deliberation, MM. Sjoeborg and Lyon formulated the majority decision, the text of which is given below, to which Colonel Bayne appended a minority opinion.

The Sale of the Shares in February, 1917

Whereas, in support of its claims, the Standard Oil Company asserts that at the time to which it is necessary to go back to determine the validity of these claims, that is, January 10, 1920, the date of coming into force of the Treaty of Versailles, it was owner of all the shares and almost all the other securities of the D. A. P. G.;

Whereas the Reparation Commission objects that at a date previous to that time the Standard Oil Company had sold all these shares;

Whereas, in fact, it is indubitable that in February, 1917, when America's declaration of war was imminent, the Standard Oil Company, desiring to save its shares from confiscation by the German Government, sold all its voting shares to a German national, Herr Riedemann; and whereas the price not having to be paid until a later date, the purchaser made over to the Standard Oil Company as partial guarantee, some securities which he held in the United States;

Whereas, however, it is necessary to examine the juridical effects of this sale;

Whereas the above-mentioned securities made over by Riedemann to the Standard Oil Company were seized as enemy property by the Alien Property Custodian, the latter, when opposition was lodged by the Standard Oil Company, asserted his belief in the good faith of the sale, but nonetheless, by a decision of February 6, 1919, declared it to be null and void;

Whereas this decision being prompted only by reasons of public order, could not lead the Tribunal to consider the sale as null;

Whereas, in order to determine the validity of the latter it is necessary to refer to German law;

Whereas this contract was concluded in Germany; whereas it is necessary in this connection to note that in reply to a cable of February 5, 1917, in which, after formulating his offer of purchase, Herr Riedemann added: "Purchase to be perfect on receipt of your confirmation," to which the Standard Oil Company replied the same day: "Terms stated accepted and sale confirmed."

Whereas, moreover, in this case, it was a question of the sale of the shares of a German company, and under the contract the shares sold were, in accordance with the express intention of the parties, to be transferred on the books of the company to their new owner;

Whereas in order to understand the effect of such a sale in German law, two legal opinions were submitted to the Tribunal, the one emanating from Professor Riesse of the University of Berlin, communicated by the Managing Board of the Standard Oil Company, and the other from Herr Max Bonnem, Advocate at the Court of Berlin, directly consulted by M. Lyon and Colonel Bayne;

Whereas it appears from these opinions that since the shares in question are registered shares, German law, which is strictly formalistic on this point, considers their sale as perfect only as and when the securities representing the shares have been the subject of a material transfer from the seller to the purchaser;

Whereas it is not denied that the certificates issued by the D. A. P. G. representing shares which formed the subject of the convention of February, 1917, never left the head office of the Standard Oil Company in the United States;

Whereas, therefore, failing their handing over to the purchaser, the sale in question must be considered, in German law, as never having been put into execution;

Whereas it is consequently certain that at the time of the coming into force of the Treaty of Versailles, the Standard Oil Company was still owner of the whole of the shares, as well as of almost all the other securities of the D. A. P. G.;

Whereas, this point being established, it is necessary to consider successively the problems arising for the Tribunal out of Paragraphs F and G of the agreement of June 7, 1920;

Paragraph F

Whereas, under this paragraph, it is for the Tribunal to decide whether the Standard Oil Company has made good its claim to the "beneficial ownership" of all or any of the tankers;

Whereas, at the outset, a question of interpretation of the terms of reference arises;

Whereas this question is: whether the proof of the ownership by the Standard Oil Company on January 10, 1920, of all or nearly all the various

categories of securities issued by the D. A. P. G. is the sole and only condition of its alleged right to the "beneficial ownership" of the tankers, or whether this right does not involve a factor in addition to the right of ownership of the securities, the nature of which factor it is for the Tribunal to determine;

Whereas, in other words, it has to be ascertained whether the previous finding of the right of ownership of the Standard Oil Company in the securities of the D. A. P. G. ends the task of the Tribunal, or whether it is only the point of departure necessary, but in itself insufficient;

Whereas the Tribunal cannot find that the agreement of June 7, 1920, may be interpreted to mean that the ownership of the securities of the D. A. P. G. would suffice to confer upon the Standard Oil Company the "beneficial ownership" of the tankers;

Whereas, in the first place, such an interpretation is belied by the preparatory reports of the said agreement, especially Paragraphs F and G, as communicated to the Tribunal by Colonel Bayne;

Whereas the Reparation Commission had entrusted the drafting of these two articles to Sir John Bradbury and Mr. Boyden, representing respectively Great Britain and the United States on the Reparation Commission;

Whereas in a telegram sent on May 19, 1920, to the State Department, Mr. Boyden summarized as follows the attitude of Sir John Bradbury with regard to the American proposal for the drafting of Paragraph F:

> He has no objection to Standard Oil Company making any claim of any kind before Tribunal. His objection is to instructing Tribunal that proposal ownership of securities shall *necessarily* lead to any particular result. He wishes whole matter to be determined by Tribunal. If your language "claim of beneficial ownership" means beneficial ownership in tankers themselves, he would accept your idea. It would then be possible for Tribunal to consider whether ownership of securities as proved did or did not constitute beneficial ownership of the tankers, but if your language means, as he thinks, that ownership of securities *necessarily* determines the question of beneficial ownership, then he is unwilling to accept your suggestion;

Whereas it further appears from this same cable that Sir John Bradbury, not accepting the American suggestion concerning the drafting of Paragraph F, proposed another wording for this paragraph, namely that which was afterwards inserted in the agreement;

Whereas in a note of May 20, 1920, transmitted to Mr. Boyden, Sir John Bradbury, who drafted it, declared:

> If the Reparation Commission rightly understands the contention of the United States Government, it is that the vessels in question are substantially the property of United States citizens by reason of the fact that an American Company is the proprietor of practically the whole of the securities of the German Company to which they belong;

Whereas it follows from the facts set forth above that prior to the signing of the agreement of June 7, 1920, the Reparation Commission, through its

spokesman Sir John Bradbury, had clearly stated to Mr. Boyden, representing the American Government, that in its opinion Article F, as it stood, could not be interpreted to mean that the problem submitted to the Tribunal was limited to examining the right of ownership of the Standard Oil Company in the securities of the D. A. P. G.;

Whereas, moreover, and independently even of the conclusion to which the preliminary reports necessarily lead, if the parties concerned had meant to submit to the Tribunal only the problem of the ownership of the securities, they would certainly not have failed to say so expressly and would not have concealed this problem, which it would have been easy to state, under cover of the "claim to beneficial ownership";

Whereas, moreover, it would be difficult, if the agreement of June 7, 1920, had been interpreted by the Standard Oil Company as limiting the task of the Tribunal, to explain why the introductory memorial of this company, signed by three eminent counsel was almost entirely devoted to discussing the juridical rights of the shareholders in the corporate assets;

Whereas, finally, such an interpretation of Paragraph F seems to render Paragraph G unnecessary; for either the Standard Oil Company, making good its right of ownership in all or part of the securities, thereby establishes directly, from this very fact, its right of ownership in all or part of the disputed vessels, or else, the Standard Oil Company having failed to get itself recognized owner of the securities, it is difficult to understand on what basis an indemnity could be awarded to it under Paragraph G;

Whereas, since the Tribunal concluded on this point that if the problem of "beneficial ownership" could only arise in so far as the Standard Oil Company had previously established its right of ownership in the securities of the D. A. P. G., the two problems remain distinct, and "beneficial ownership" is only conceivable in the form of a special kind of right, distinct from the right of ownership of the securities and additional to it;

Whereas it is consequently necessary to ascertain what this right may be from the definition given of it by the Standard Oil Company, to whom it falls to make good its claim to "beneficial ownership";

Whereas, indeed, the two memorials submitted to the Tribunal in the name of the Standard Oil Company, that of Mr. John B. Moore of December 31, 1921, and that of Mr. Piesse of August 31, 1923, furnish a twofold definition of this expression;

A

(a) Whereas the first definition appears in Nos. 16 and 17 of the "*de facto* and *de jure* Summary" at the close of the first memorial (p. 114), as follows:

> *16*. The right of beneficial ownership, derived from the substantial, *i.e.* the lucrative or economic interest, is universally recognized. This right, although subject to the agreed conditions of legal control, *reaches the property itself* and comprises the right to the continued present enjoyment and ultimate possession.

17. The right of beneficial ownership is most frequently assured through corporate organization, in which individuals unite their resources for purposes of business, and while the control and use of the property are subject to the terms of the corporate agreement, yet the contributing individuals, as the ultimate owners of the assets, have in the capital and business *a distinct and positive right of property which the law recognizes and protects.* This right, no matter by what form of security it is evidenced, is recognized under all legal systems;

Whereas the argument of the Standard Oil Company is perfectly unambiguous since it lays down very clearly that in its view the shareholder in a company has in the assets of that company "a distinct and positive right of property which the law protects," a right *sui generis* known as beneficial ownership which is essentially a right which "reaches the property";

Whereas the existence of such a right can be affirmed by the Tribunal only in so far as it could be proved that this right has been recognized by doctrine and sanctioned by jurisprudence;

(b) Whereas indeed the memorials of the Standard Oil Company quote passages from authors and appeal to the works of doctrinal authorities;

Whereas, however interesting these opinions may be from the theoretical point of view and for the effect they may possibly have on future jurisprudence, the Tribunal must remark that up to the present they have encountered the opposition of most doctrine and nearly all jurisprudence, which in all countries accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders;

Whereas in fact the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets;

Whereas it is sufficient in this connection to quote, in so far as concerns the United States, the case of Eisner *v.* Macomber (1919, 252 U. S. 189), in which, the point being to determine whether stock dividend should be considered to be dividend which as such became the property of the shareholders or to be capital which remained the property of the company, in this case the Standard Oil Company of California, the Supreme Court of the United States declared that: "The stockholder's interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has the full title, legal and equitable, to the whole";

Whereas this decision must be compared with the decision of the New York State Appellate Court in the case of Riggs *v.* Insurance Co. (123 N. Y. 7, 1890), in which, replying in the affirmative to the question as to whether a shareholder as such had the right to insure certain corporate property, the court declared: "It seems to us, both upon authority and reason, that the

insurance now in question is a fair and reasonable contract of indemnity founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured";

Whereas numerous similar decisions have been rendered by the British courts, and whereas it will be sufficient to quote in this connection the following decisions which have established a precedent:

Bulmer *v.* Norris (1860, 9 C. B. N. S. 19), in which it was decided that the shareholder in a joint stock company had no legal or equitable interest in lands belonging to the company, his interest being limited to a proportional share in the profits of the company;

R. *v.* Arnaud (1846, 9 Q. B. 806), in which Lord Denman, deciding the case of a limited liability company which was the owner of a vessel, declared that "the corporation is, as such, the sole owner of the ship, and individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel";

Gramaphone Co. Ltd. *v.* Stanley (1908, 2 K. B. 89), in which Lord Cozens Hardy declared:

> The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in a sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to the policy, but it does not in any way diminish the rights and powers of the directors or make the property and assets his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares but no more;

Whereas a decision of the House of Lords of April 3, 1925 (Macaura *v.* Northern Assurance Company, Ltd.) (Times Law Reports, May 8, 1925, page 447), summing up and confirming all this jurisprudence, declared null and void a contract insuring a stock of building timber belonging to a company, concluded by a person who was at the same time the owner of all the shares of the company and by far its most important creditor;

Whereas in support of this conclusion it is pertinent to quote the following passages by Lords Buckmaster, Sumner and Wrenbury:

Lord Buckmaster:

> Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up;

Lord Sumner:

> He stood in no legal or equitable relation to the timber at all. He had no concern in the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire;

Lord Wrenbury:

> This appeal may be disposed of by saying that the corporator, even if he holds all the shares, is not the corporation and that neither he nor any member of the company has any property, legal or equitable, in the assets of the corporation;

Whereas, in so far as concerns French jurisprudence, it will be sufficient to quote Professor Thalier, who is one of the most eminent opponents of the classic theory of the personality of companies, but who adds, on page 189 of the 1916 edition of his *Traité élémentaire de droit commercial:* "Jurisprudence has immutable faith in it and does not seem even to suspect the existence of the other constructions which doctrine advances in opposition";

(c) Whereas the memorials of the Standard Oil Company rely also on various legal or administrative decisions on the seizure of ships or the sequestration of property belonging to companies during the war, according to which courts and administrations of the belligerent countries admitted that the nationality and personality of a company could not constitute an obstacle to a seizure or a sequestration if it could be proved that the company was "controlled" by enemy subjects;

Whereas however the decisions and circulars relied on have avoided placing themselves in direct opposition to the classic theory and the established doctrine; whereas they never denied that the company should in private law be considered to be the legitimate owner of the property seized or sequestrated; whereas reasons of public weal and national safety alone led them to admit that the enemy nationality of the shareholders must affect the character and functions of the company;

Whereas, in order to bring out the real nature of the decision of the House of Lords in the case of Daimler Company, Ltd. *v.* Continental Tyre & Rubber Company (1916 2 App. Cas. 307), and to show the error in the conclusions which the Standard Oil Company seeks to draw from it in favor of its theory, it is sufficient to quote the following passage from Lord Parker's opinion:

> No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it, and the acts of its servants and agents are its acts while its shareholders as such have no property in the assets and no personal responsibility for those acts;

Whereas the decision quoted above, without ignoring either the personality of a company or its right of ownership in the corporate assets, merely draws certain conclusions from the control which is or may be exercised by a shareholder or a group of shareholders over the activity of the company;

Whereas to state that a physical person, a legal person or a group of physical or legal persons exercise a preponderating influence over a given legal person is obviously not equivalent to declaring or admitting that they have a right of ownership in the property of the latter;

Whereas this is so true that when the legal person controlled is an enemy its property can be seized, no account being taken of the fact that the third parties vested with this control are allied or neutral;

Whereas, although it has happened that, for the reasons above set forth, allied companies have been found to be enemy in character and have been treated as enemies, it has not happened—no legal decision is quoted to this effect—that enemy companies have not been treated as such, even when some or all of the shareholders were of allied or neutral nationality;

Whereas the Supreme Court of the United States sustained a similar theory in the case of the *Pedro* (175 U. S. 354), in which a vessel belonging to a Spanish company and captured by the American Navy during the Spanish-American War was declared lawful prize by the Supreme Court, although all the shares of this company were held by British nationals;

(d) Whereas finally the awards of international arbitration relied on by the Standard Oil Company, in particular those rendered in the cases of the "Delagoa Bay," "El Triunfo," "Alsop" and "Orinoco Steamship" companies cannot be held to support its theory;

Whereas in none of these cases has it been a question of granting or assigning to claimant shareholders or debenture-holders rights in any part of the corporate assets, but merely of granting them indemnity for damage caused by unjustified intervention on the part of the government;

Whereas moreover in all these cases, and notably in the first two, which are the most important, it was clearly specified that the shareholders and debenture-holders were admitted, in view of the circumstances, to be exercising not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; and whereas they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights;

B

Whereas, it is true, the conception of "beneficial ownership" has taken, in the oral argument of the Standard Oil Company as reproduced and completed in its supplementary memorial of August 31, 1923, a new form which this memorial presents as follows:

> The owner of property may, or may not, be the beneficial owner of that property, and a beneficial owner may not be the owner, when that

word is used in the proprietary sense. The owner may be the legal owner of the title to the property, but the beneficial owner is he who has or owns the beneficial interest in that property. The words beneficial owners as used in Paragraphs F and G of the agreement of June 7, 1920, must and can only have been used in the sense of the owner of the beneficial interest without the legal title (page 42);

The words beneficial owner when used together can have but one meaning, and that is, the owner of the benefit, or the owner of the beneficial interest. In the case of a corporation, the corporation itself is entitled to receive the income from the property owned by the corporation, but the shareholders of the corporation are the parties for whose ultimate benefit such income is received. In the present case the D. A. P. G. were entitled to receive the profits derived from the tankers in question, but such profits were received by the corporation for the benefit of its shareholders, and therefore the shareholders were the beneficial owners of the tankers (page 44);

Whereas, according to this new and alternative interpretation, the shareholder would be owner of the corporate assets, not in the legal but in the economic sense, in that he would be owner of the income produced by the operation of the corporate assets;

Whereas however it is not correct to state that the shareholders have a right of ownership in the profits of the operation; whereas indeed the profits belong to them only in so far as and when they are distributed; whereas before this date they are precisely the property of the company, which at the general meeting will decide as such, by the majority vote of the shareholders, on the use to be made of the profits;

Whereas from that time the shareholders have a right of ownership only in that share of the income which it has been decided to allot to them;

Whereas this right, and the right to share in the division of the assets of the company when dissolved, seem indeed to constitute the two essential characteristics of the right of the shareholder and to be merged with it, so that it is impossible to discern the distinct aspects of any "beneficial ownership" which might be added;

C

Whereas, in fine, according to the commentaries furnished and the documents produced by the Standard Oil Company, "beneficial ownership" constitutes a right of ownership for the shareholders either in the corporate assets or in the profits from the operation of these assets;

Whereas, in the first hypothesis, this alleged right would be in contradiction with universal jurisprudence, in particular with that of the United States, Great Britain and France;

Whereas, in the second hypothesis, it would be merged with the shareholder's right of ownership in his shares, and is therefore only a new expression for the same legal fact;

Whereas, finally, in the course of its written and oral observations the

Standard Oil Company has sometimes seemed to maintain that the beneficial ownership on which it relied was not included in the classic legal categories, but must be considered and recognized as a right of an economic nature;

Whereas, however, to proclaim the economic character of an alleged right is not sufficient to vest it with the privileges and sanctions of a right of ownership; whereas the right which the shareholder derives from his share is indisputably of an economic nature, but cannot confer upon him a right of ownership either in the corporate assets or in the corporate earnings, as has just been shown;

PARAGRAPH G

Whereas the Standard Oil Company, not having made good its claim to the beneficial ownership of any of the tankers under Paragraph F of the agreement of June 7, 1920, it is for the Tribunal to ascertain whether this company is justified in claiming indemnity under Paragraph G of the same agreement;

Whereas—in vain, so far as this paragraph is concerned—the Standard Oil Company seems at times to seek to maintain that the right to financial reimbursement necessarily arises from its possession of the shares of the D. A. P. G.

Whereas, since compensation under Paragraph G should take the form of a surrender of boats, and since Paragraph F provides for the event of the Standard Oil Company's establishing its beneficial ownership of some of the boats only, which alone would be assigned to it, the difference between the two paragraphs, in such a construction, is not evident;

Whereas moreover the arguments previously adduced in connection with Paragraph F to set aside the identity between beneficial ownership and ownership of shares may be extended to Paragraph G, in respect of the alleged identity between the possession of shares and the right to financial reimbursement;

Whereas, just as the ownership of shares can imply beneficial ownership in the corporate assets represented by the tankers only in so far as it is reinforced by a legal factor of which the Tribunal finds no trace in doctrine or jurisprudence, so the possession of these shares can confer a right to financial reimbursement only in so far as this right is founded on some express text or on considerations of justice involving a judicial sanction;

Whereas, finally, when Paragraph G lays down that a certain number of tankers, to be determined later, will be handed over to the Standard Oil Company only in so far as it may be found to be entitled to financial reimbursement, it clearly leaves it to the Tribunal to examine and to judge whether it is so entitled;

(a) Whereas the essential if not the only title relied on by the Standard Oil Company is Paragraph 20 of Annex II to Part VIII of the Treaty of Versailles;

Whereas this article reads as follows in French and English:

La Commission, en fixant ou acceptant les payements qui s'effectueront par remise de biens ou droits déterminés, tiendra compte de tous droits et intérêts légitimes des Puissances alliées et associées ou neutres et de leurs ressortissants dans lesdits;

The Commission, in fixing or accepting payment in specified property or rights, shall have due regard for any legal or equitable interests of the Allied and Associated Powers or of neutral Powers or of their nationals therein;

Whereas it is to be remarked that there is a notable discrepancy in these texts, for while the English stipulates that due regard shall be had to any "legal or equitable interests," which corresponds to very clear and well-known conceptions of English and American law, of which equity is a form, the French employs the infinitely vaguer phrase of "droits et intérêts légitimes," which corresponds to no definite legal idea;

Whereas therefore everything points to the conclusion that the French phrase is merely the translation of the English, in which alone the expression employed has legal sense, and which makes clear the general tenor of the articles;

Whereas if we rely on the meaning in English law of the words "legal or equitable interests" and if we consider that the hypothesis envisaged in paragraph 20 is the "remise" to the Reparation Commission of "specified property or rights," it is obvious that the "legal or equitable rights" to which, according to this same paragraph, due regard shall be had, are only the real rights, the "jura in re";

Whereas it has just been shown that the rights of shareholders in the corporate assets cannot imply such a limitation;

Whereas it is to be noted that according to the decisions of American and British courts above mentioned the right of the shareholder implies no legal or equitable interest in the corporate assets;

Whereas it will be sufficient in this connection to recall that, in the case of Eisner *v.* Macomber, the Supreme Court of the United States declared that "the corporation has the full title, *legal and equitable*, to the whole (the entire assets, business and affairs of the company)," and that in the case of Macaura *v.* Northern Assurance Company, Ltd., Lord Wrenbury, interpreting the opinion of the members of the House of Lords, declared that "no member of the company has any property, *legal or equitable*, in the assets of the corporation";

Whereas moreover the Reparation Commission, in its interpretation of paragraph 20, agreed with this jurisprudence in so far as it confirmed the report of its Maritime Service of January 13, 1922, on "legal and equitable claims under paragraph 20";

Whereas this report rejected all claims advanced by Allied or neutral shareholders in German shipping companies whose boats had been handed over in execution of Annex III, because "a shareholder's interest in a shipping company owning a ship or ships cannot be regarded as a legal or equitable interest in the ship or ships under paragraph 20";

(b) Whereas, it is true, it was a question only of claimants possessing some shares of these companies, and whereas the Standard Oil Company has several times relied on the fact that it was practically the sole shareholder and the sole creditor of the D. A. P. G.;

Whereas however paragraph 11 of Annex II, which may be relied on in this discussion with as good reason as paragraph 20 of the same Annex, specifies that the decisions of the Reparation Commission must follow "the same principles and rules in all cases where they are applicable";

Whereas this provision makes it obviously impossible to draw a distinction between the holder of a share in a company and the holder of all the shares;

Whereas only the extent and not the nature or the essence of his right can vary with the number of shares that a shareholder may possess;

Whereas moreover it is inconceivable in practice that during the existence of a company and the transfers of shares that take place the rights of shareholders in the corporate assets could vary with the number of shares held by each of them;

Whereas these rights must be identical, whether the company's shares are distributed among many holders or are owned by a single holder;

Whereas it will be sufficient to recall in this connection the decisions of the House of Lords above quoted in the cases Gramaphone Company, Ltd. *v.* Stanley and Macaura *v.* Northern Assurance Company, Ltd.

(c) Whereas, it is true, this same paragraph 11 of Annex II states that the Commission "shall be guided by justice, *equity* and good faith" and that the Tribunal is equally bound to consider the Standard Oil Company's claim from the point of view of equity, above all since this company has on several occasions made a final appeal to reasons of equity;

Whereas however the entire theory of the Standard Oil Company rests on the establishment of its right of ownership, on January 10, 1920, in the shares of the D. A. P. G. that is, shares involving, together with the right to vote, the control of this company;

Whereas in fact it is obvious that if the Standard Oil Company had been able to rely only on the ownership of share-warrants and debentures on this date, if it had been unable to come forward only as a creditor, even a first creditor, of the D. A. P. G., its claim would have been deprived of all legal basis and devoid of any consideration of equity;

Whereas the sale of shares to which it proceeded in February, 1917, in favour of a German national was, according to the Standard Oil Company, a regular and valid sale *ergo omnes;* whereas the Standard Oil Company has not ceased to contend, before the Alien Property Custodian, that in its view the sale preserved this character;

Whereas, although the Tribunal has nevertheless deemed it necessary to set aside this contract of sale, thereby allowing the right of ownership of the Standard Oil Company in the shares on January 10, 1920, to stand, it was

only by strict application of the German law, which has remained exceptionally formalistic on this point;

Whereas the Standard Oil Company was able to submit its claim to the Tribunal only by the application of strictly legal considerations;

Whereas therefore it does not seem that the Standard Oil Company, which, in order to be able to take advantage of paragraph 20, was obliged to rely on strictly legal arguments, can be allowed, in order to escape from the interpretation which this paragraph implies and from the application of it made by the Reparation Commission to shareholders in other shipping companies, to rely on mere considerations of equity;

(d) Whereas moreover, even if we set aside this argument and rely solely on arguments based on *equity*, they do not justify granting financial reimbursement to the Standard Oil Company;

Whereas, first of all, the Standard Oil Company cannot, in support of its claim for reimbursement, rely on the arbitral awards rendered in the cases mentioned above;

Whereas, in fact, the damage involved in these cases, for which the foreign shareholders or debenture-holders obtained reparation through international channels, was damage caused by government intervention recognized to be wrongful; whereas thus, in the cases of the Delagoa Bay and El Triunfo companies, the Portuguese and Salvador Governments, in appropriating without compensation the property of these companies by arbitrary measures which affected them alone, had committed acts that might be ranked as overstepping of authority or abuse of law;

Whereas in the present case no such grievance could be or has been brought forward; whereas it was in execution of an international undertaking that the German Government proceeded to the confiscation of the tankers; whereas moreover it has not been claimed that the indemnity paid under this head to the D. A. P. G. by the said government was comparable to that which in the same circumstances has been granted to other German shipping companies;

Whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country;

Whereas therefore an Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals;

Whereas this principle of equality of treatment, and not of discrimination in favor of Allied and Associated nationals, has moreover been consecrated by the Treaty of Versailles in Articles 276 C and D and 297 J dealing with the treatment to be accorded in Germany to the property and interests of the said nationals after January 10, 1920;

Whereas this same principle seems also to have been followed by the

Reparation Commission in the case of laws for the execution of the Dawes Plan;

Whereas in fact several metallurgic and mining companies, indisputably German but of which most or all the shareholders were Allied nationals, having protested to the Reparation Commission against the subjection of their concerns to the mortgage charge represented by the industrial debentures of the Dawes Plan, the Commission merely transmitted their claims to the Trustee for these debentures, together with the unanimous opinion of its Legal Service (Opinion No. 527 of November 27, 1924); whereas this opinion rejected the claims because all foreign nationals, including Allied and Associated nationals, residing in Germany or possessing property there, must be considered to be subject, on the same footing as German nationals, to the payment of the charges provided for by the laws carrying out the Dawes Plan;

Whereas, in fine, at the time of the confiscation of the tankers of the D. A. P. G., the German Government committed no act of discrimination against this company as compared with other German shipping companies;

Whereas therefore the granting of compensation to the Standard Oil Company cannot be justified, as against these companies, by any consideration of equity;

Whereas such compensation should not in equity be justified as against the other Allied or neutral shareholders in German shipping companies, since the claims for compensation advanced by these shareholders have rightly been rejected by the Reparation Commission;

Whereas it is true that these same shareholders held only a few shares, but whereas it seems that equity would be thwarted *a fortiori* if a shareholder could collect, as the holder of a large number of shares, an indemnity which had been refused to less important shareholders;

FOR THESE REASONS

The Tribunal

Declares that the Standard Oil Company has not made good its claim to beneficial ownership of any of the tankers in question, under Paragraph F of the agreement of June 7, 1920;

Declares that neither is the Standard Oil Company justified in claiming indemnity under Paragraph G of the same agreement;

Finds, therefore, that the tankers *Niobe*, *Pawnee*, *Hera*, *Loki* and *Wotan*, as well as the proceeds of their operation and the proceeds of the sale of the tankers *Helios*, *Mannheim* and *Sirius*, shall remain, under Annex III to Part VIII of the Treaty of Versailles, the property of the Allied and Associated Governments represented by the Reparation Commission.

The present award is drawn up in two copies signed by MM. Erik Sjoeborg and Jacques Lyon.

One of these copies is deposited with the General Secretariat of the Reparation Commission at Paris.

The other copy is delivered to the Government of the United States of America, by the intermediary of Mr. Hill, unofficial delegate of the said government to the Reparation Commission.

Done and signed at Paris this fifth day of August, one thousand nine hundred and twenty-six.

(Signed) ERIK SJOEBORG. JACQUES LYON.

SUPREME COURT OF JUSTICE OF THE NATION

MEXICO, FEDERAL DISTRICT, WITH THE COURT IN BANC

November 17,1927

[Translation]*

An American oil company, which had been operating in Mexico under the constitution and laws in force prior to May 1, 1917, declined to comply with the regulations promulgated under the new constitution of 1917 requiring such companies, under penalty of forfeiture of their rights, to apply within one year for confirmation of their titles which, upon compliance with the new law, would be extended for a period of fifty years. Thereupon, the drilling permits of the company were revoked by the Secretariat of Industry, and the company petitioned the District Court for a writ of *amparo* for protection against this action. The District Court granted the *amparo* on the ground that the proper legal procedure had not been followed in the cancellation of the permits, and both parties appealed because of dissatisfaction with the reasons for the decision.

The company contended that as it possessed full ownership of its petroleum property for an indefinite duration under the constitution and laws in force prior to May 1, 1917, the new regulation requiring it to apply for confirmation for a limited period was unconstitutional because of its retroactive effect, and confiscatory because of its violation of constitutional guarantees safeguarding private property.

The Supreme Court held that the attempt by confirmation to limit the company's rights to a term of fifty years was unconstitutional. Consequently, if the plaintiff company could not solicit the confirmation of its pre-existing rights without limiting them as to term, it was indispensable that this restriction of the law must first disappear before the term of one year, provided in the law, could be held to have elapsed; but in so far as the law required the confirmation of acquired rights without any substantial alteration of them, there was no violation of constitutional guarantees because the requirement of confirmation is only a procedure with regard to tenure imposed by the legislative body for reasons of public order for the use and exercise of these rights and for the purpose of safeguarding them. The decision of the District Court in granting the *amparo* was therefore confirmed.

At the hearing on revision of the action of *amparo* [injunction or mandamus] brought by the attorney-in-fact of the Mexican Petroleum Company of California, against acts of the Secretariat of Industry, Commerce and Labor and the Agent of said Secretariat, in charge of the Technical

*Comparative Law Series No. 165, November, 1927, Bureau of Foreign and Domestic Commerce, Washington, D. C. The following note accompanies the translation: "The foregoing is a translation prepared by the Association of Petroleum Producers in Mexico, and in accordance with regulations the Bureau of Foreign and Domestic Commerce can assume no responsibility for its accuracy."

Headnote by the Managing Editor of the JOURNAL.

Petroleum Agency in Tampico, State of Tamaulipas, and for violation of Articles 4, 14, 16, 22 and 27 of the Federal Constitution; and,

IT APPEARING:

FIRST: By writing of the 26th of January of the current year, presented on the following day, Mr. Carlos Palomar, as agent and attorney-in-fact of the Mexican Petroleum Company of California, which character he proved with the original copy of the power-of-attorney exhibited with his petition, solicited protection (*amparo*) against acts of the authorities before mentioned, as set forth in official communications numbers 1090, 1091 and 1092 of the 11th of January of the same year, addressed by the Chief of the Technical Petroleum Agency in Tampico to the representative of the company before referred to, by means of which he communicates to him that on account of not complying with the mandate contained in the Reglamentary Law of Constitutional Article 27 concerning petroleum, which requires solicitation of confirmation of rights to the subsoil acquired previously to the 1st of May, 1917, by express instructions of the Secretariat of Industry, said agency revokes the permits granted by official communications No. 82 of the 3rd of January of the present year, No. 11 of the same date, and No. 21, also of the same date, for the drilling of wells "Mendez No. 27," "Chijol No. 63" and "Dicha No. 104," respectively, in lands of the extinct Hacienda of Chapacao, Municipality of Panuco, State of Vera Cruz.

These acts are considered as violating the guarantees which are conceded by the constitutional articles before mentioned and, as basis for the cause of action, the plaintiff company, as antecedents of the case, alleges: That in the City of Mexico in the month of January of last year, it sought protection (*amparo*) against the provisions of Articles 2, 4, 14, and 15 of the Reglamentary Law of Constitutional Article 27 concerning petroleum, in so far as those precepts deprived said company of those rights of exploration and exploitation of the petroliferous subsoil, acquired previous to the 1st of May, 1917; that the District Judge rejected the petition as being contrary to law (*por improcedente*), the Supreme Court has confirmed this ruling; that the plaintiff regarded that these constitutional rulings modified, to its damage and with relation to its properties and rights, a juridical status existing previous to the 1st of May, 1917, the date on which Article 27 of the Constitution went into effect; that the Supreme Court held otherwise, declaring that the law did not at that time take away its rights and possessions, adding that Article 14 and 15 of the Reglamentary Law, in fixing in conjunction with Article 12, the period of one year, within which confirmation of those rights might be applied for, if possible, it was to be concluded that those legal precepts cited did not have the character of being immediately obligatory, closing with the expression that it could not show, at this time, any concrete act of execution.

That having now presented this concrete act, the action of *amparo* was begun in the following terms: Prior to May 1, 1917, the plaintiff, a foreign company organized according to the laws of the State of California, U. S. A., domiciled in the Mexican Republic, with capacity to engage in commerce in the same, by having complied with the legal prerequisites, acquired in the State of Vera Cruz various lots of land which formed part of the extinct Hacienda of "Tampalache, Chila y sus Llanos," known also by the name of Chapacao, acquisitions which it has been exploiting for petroleum and which date from twenty-five years ago, as do also the works undertaken; that the Secretariat of Industry recognized its rights in a most ample manner by means of the official communications of the 2nd of September, 1926, and the 16th of October of the same year; that said recognitions were executed after having seen titles which prove its rights, and of which photostatic copies are hereto attached, reserving the right, in case it should be necessary, to present the originals; that the fundamental purpose of the company is the exploitation of petroleum, for which reason, upon acquiring the various lands, it did so with the direct purpose of taking out and enjoying the oil, purposes which are corroborated by positive acts of exploitation which it has been carrying on for twenty-five years; that the official communications in which the drilling permits are revoked, attack its rights in violation of the individual guarantees which are invoked, because the 2nd article of the Petroleum Law declares in absolute terms that only by express authorization of the Federal Executive, granted in the terms of the law and its regulations, can the works be carried out which the petroleum industry requires; because the 4th article declares that only Mexicans, companies organized in conformity to Mexican laws, and those foreign individuals (the latter under certain conditions) may obtain petroleum concessions, thus excluding foreign companies such as is the plaintiff; because Article 14 provides that there may be confirmed by means of concessions executed according to said law, those rights which are derived from lands in which there might have been commenced exploitation works before May 1, 1917, to the exclusion of any others, on condition that the limit of these confirmations shall not exceed fifty years, reckoned from the time when exploitation works may have commenced; because Article 15, under which the period of one year is granted for applying for confirmatory concessions, fixes the sanction that, upon not doing so, the respective rights shall be considered as waived, and of no effect against the Federal Government.

In the points of law contained in the petition, it is said in concrete that considering the real property which the plaintiff acquired in full ownership before the 1st of May, 1917, its rights to the subsoil are confused with those which it has over the surface, which, according to ordinary law, as it was in force before the date cited, formed a whole with the lower strata, without any other limitations than those established by the Mining Laws, as set

forth in Article 731 of the Civil Code, the discussion as to whether or not coal, petroleum and other combustible minerals belonged to the owner of the land having remained definitely settled by the Mining Code of 1884 which declared, in its Article 10, that these substances were the exclusive property of the owner of the soil, the same being also declared by the Mining Law of the 25th of November, 1909; and the acquisition made by the Mexican Petroleum Company being under the protection of these laws, the rights of the company to the subsoil as far as concerns the real properties obtained before the Constitution went into effect are of an indefinite duration, as the right of ownership (*propriedad*) itself, by reason whereof the Petroleum Law, in failing to recognize those rights in its Articles 2, 4, 14, and 15, violated the individual guarantees before mentioned to its prejudice, inasmuch as its rights to exploit the subsoil cannot be derived from a future concession or from a permit or authorization which the Executive may issue to it, except that they flow from the titles themselves; because it is excluded, as a foreign company, of the same right of exploitation of the subsoil, as it cannot obtain a concession, nor can it have its rights confirmed, because in the supposition that it might be issued a concession, this could only refer to the lands in which works of exploitation might have been commenced before the 1st of May, 1917, thereby excluding those lands which might not have been developed (*trabajado*); because it is limited as to time, without taking into consideration that as regards real property possessed by title of ownership, this right is indefinite; and, lastly, because it established as a condition to obtain the concessions that the latter be sought within the period of one year, under the sanction of loss of all those rights actually existent, or in other words, that the titles of acquisition be cancelled, all rights definitely lost and the interests of the company confiscated.

There are seven violations set out in the complaint:

I. That of Constitutional Article 4, because Article 15 of the Petroleum Law deprives the plaintiff company of the accumulation of capital invested in the subsoil which said article confiscated, depriving the said company of the product of its labor and of the fruit of its endeavors;

II. That also of Constitutional Article 14, because Article 27 of the Constitution is applied retroactively inasmuch as the Petroleum Law fails to recognize the significance of this constitutional provision in the part which refers to the concrete case, cause of the *amparo*, because in unmistakable terms the Supreme Court in five final decisions has so held;

III. The same Article 14, in the view that the official communications deprive the Mexican Petroleum Company of its properties, possessions and rights, without suit having been brought (*sin que haya mediado juicio*) nor, without there having been fulfilled the other requisites required by paragraph II of the constitutional provision cited, inasmuch as, upon applying

Article 15 of the Petroleum Law, the right which the company has to the subsoil of the lands is not recognized, and it is deprived of the right to exploit them acquired by virtue of previous laws;

IV. That of Article 16 of the Constitution, because without legal cause, the responsible authorities molest the plaintiff company in its possessions, preventing it from the exercise of its rights, and depriving it of the same;

V. That of Article 22 of the Constitution, because Article 15 punishes with the penalty of confiscation anyone who may not have consented thereto, as happens with the plaintiff, in that they are given new titles in lieu of their old titles to the subsoil, even assuming that the exchange of those titles could be made, as cannot be done in the case because the company is a foreign corporation, the confiscation is absolute and inevitable;

VI. That of Article 27 of the Constitution, because retroactive effects are given to Articles 14 and 15 of the Petroleum Law, when neither by the letter nor the spirit thereof, as declared by the Supreme Court, does Constitutional Article 27 have that character regarding rights to the petroliferous subsoil acquired before May 1, 1917; and,

VII. That of Article 27, in that no one can be despoiled of his properties except by way of expropriation for cause of public welfare and by means of indemnization.

AND IT APPEARING:

SECOND: The plea being admitted by the District Judge in Villa Cuauhtemoc, before whom it was presented, the Secretariat of Industry, Commerce and Labor declared: That the drilling permits granted were given expressly and categorically with a provisional character, that is, uncertain, subject to the provisions of the Petroleum Law, so they did not assume a recognition of rights to the subsoil, nor in any event did they confer by themselves that recognition; therefore, if the company did not comply with the fundamental condition on which depended the subsistence of said permits, that is to say, if it did not comply with the provisions of Articles 14 and 15 of said Petroleum Law, voluntarily renouncing the rights which it might have in the subsoil, it cannot contend now that its rights may have been violated upon ordering the cancellation of those permits; that in so far as the application of certain articles of said Petroleum Law is concerned, it must state that it treats of a law which in general terms considers as waived the true rights, the confirmation of which might not have been solicited in the term provided for, but until it is proven that such rights exist, and that the Petroleum Law causes damages or prejudice, the *amparo* does not lie; that the jurisprudence which is invoked does not declare that persons to whom reference is made have legally acquired rights, and that they should be respected, but that it (the jurisprudence) only establishes that their rights be respected always and when they are proven and that to this effect the order

of the President of the Republic, providing that the Attorney General of the Republic be informed what companies had not solicited the confirmation of those rights which they asserted, for the purpose of instituting proceedings to regain possession of the rights to the subsoil which belong to the nation, gives facilities to the companies to show their rights and to prove that the Petroleum Law seeks to deprive them thereof. Hence it will be against the final decision to be rendered in this suit that an action of *amparo* lies for violation of constitutional guarantees which may be violated particularly on account of the provisions of Article 14, but which in the present *amparo* case, it cannot be proven that it legally has to do with acquired rights; by reason thereof it is also impossible to resolve that they have been deprived of these rights.

The Petroleum Agency in Tampico failed to render its report; and the hearing having taken place in which the plaintiff company offered in evidence various certified copies of the instruments by means of which it alleges that it acquired its rights, and the evidence tending to prove the carrying out of petroleum exploration and exploitation works before May 1, 1917, the District Judge, in disagreement with the contentions of the District Attorney, conceded the *amparo*, basing it upon the fact that the Mexican Petroleum Company has been deprived of its rights to explore and exploit the subsoil of Chapacao, without suit having been brought, in violation of Articles 14 and 16 of the Constitution, in view of the fact that the nationalization of petroleum must be made effective against private parties through the judicial tribunals, according to Article 27 of the Federal Constitution.

AND IT APPEARING:

THIRD: The Secretariat of Industry, its agency in Tampico, the Attorney General and the plaintiff company appealed, and the first two mentioned set up the same errors, alleging: That the decision is in conflict in its declarations with the arguments set forth, in that it concedes the *amparo*, and at the same time declares that neither Article 27 of the Constitution nor the mandates of the Petroleum Law violate individual guarantees, because the authorities are not those that are applying said laws retroactively but the legislator; that the said sentence is contrary to the letter and spirit of Article 27 before mentioned and the Petroleum Law, as the plaintiff alone can be the owner of the petroleum which it causes to be produced or which is produced naturally, but not of that which it may eventually obtain, as that as yet has not been reduced to possession; that the application of Article 15 of the Petroleum Law is overlooked in the decision, which article in unmistakable terms establishes that those rights the confirmation of which might not have been solicited shall be considered as waived; that the Sixth Whereas Clause is based upon an erroneous interpretation of Constitutional Article 27, considering that the cancellation of the permits does not imply on the

part of the Secretariat the exercise of an action, but purely and simply the compliance with Article 15 already cited, and that the judge failed to consider the clause which categorically expresses and states the permits are of a provisional character and that they are subject to the Petroleum Law.

The District Attorney says: That there is a contradiction between the Third and Sixth Whereas Clauses; that the decision is contradictory to others rendered by the same court in similar cases; that the right to drill has not entered into the patrimony of the plaintiff company, in such a manner, that, in order to withdraw it, there be a necessity for a law suit, as the peremptory and conditional rights granted as an act of grace (*a tirule de gracia*) for deriving benefit from the natural elements are without any legal effect, when compliance has not been had with the conditions established in the documents through which the act of grace was obtained, and further, that a real and perpetual right to the subsoil—which is assumed to have been proven—is a thing which is not the case. The plaintiff company agreed with the decision but appealed in order that the Supreme Court affirm the granting of the *amparo* upon the ground that it is prohibited from exploiting the petroleum deposits in violation of Article 4 of the Constitution; in which it is not right, as the Supreme Court has established jurisprudence that paragraph IV of Article 27 of the Constitution is neither retroactive in the letter nor the spirit thereof; that neither is it true, as the decision stipulates, that the cancellation of the permits ceases to be a penalty or a confiscation, that the violation of Article 27 of the Constitution in so far as it is connected with expropriation was not considered in that it is deemed that the privation of those rights could be made legally by resorting to the judicial authorities and following the proceeding indicated by Article 27; and in not having regarded the proofs presented with which the right of ownership and the use of that right was shown.

AND IT APPEARING THAT:

FOURTH: The transcript having reached the Supreme Court of Justice and the appeal being admitted, the file was placed at the disposal of the parties and the Attorney General in order that he might formulate his bill, he having done so in the sense that the decision be revoked, that the *amparo* be denied, basing it upon the fact that, if the permits granted were of a provisional character and subject to the provisions of the Reglamentary Law of the Constitutional Article 27 in the branch concerning petroleum, said permits could be revoked if the company failed to comply with the requirements of the law, and as it voluntarily failed to solicit the confirmation of the rights which it contends that it has, the revocation was justified in the law without it being necessary to enter into a law suit, because said formality is unnecessary for the revocation of administrative permits.

WHEREAS:

FIRST: The grievances which the authorities allege shown as responsible are found so intimately connected with those expounded by the District Attorney that, upon studying the former implicitly the latter are included without the necessity of making special mention of the one or the other. Therefore, and with the exception of that which refers to not having proved the existence of the rights which the complaining company says it has, complaint alleged by the Attorney General and which will be treated of in a later clause, the others, as is said before, will be analyzed at the same time.

AND, WHEREAS:

SECOND: Objection is made that the resolutory part of the sentence is in contradiction with some of its considerations in that the *amparo* was granted despite the fact that the latter maintained that the legislative body is that which gave retroactive effects to the law, and not the responsible authorities, and therefore, in applying it, there are no violations of guarantees in this regard. This grievance does not exist, for assuming this to be true, that alone would not be sufficient for the reversal of the decision, unless the said considerations directly governed the resolutory part of the sentence. On the contrary, it appears from the decision that the retroactivity which the plaintiff company alleged that the law contained was not the basic motive upon which the *amparo* was granted, but it was granted because the judge deemed that there was a privation of rights without the corresponding suit, and contrary to Articles 14, 16 and 27 of the Constitution, a viewpoint of the judge which the Supreme Court will not analyze.

It is also affirmed that the decision recognized that the existence of a potential right is violated, such as the right of the company to exploit the subsoil. It is not true that a simple expectancy is involved, for in addition to the fact that the District Judge has only made reference to the rights to explore and exploit, conceded to the plaintiff, those rights exist not potentially but because of the operations which the company has carried to conclusion under the respective permits, under the protection of previous general provisions and for that circumstance alone it involves more than a simple expectancy.

Furthermore, when the said Petroleum Law which is sought to be applied expressly recognizes the possible and real existence of these rights by enumerating them in its Article 14 without it disowning the said rights because of a pretended failure to exercise the same, or of an enjoyment which has been had; and the Secretariat of Industry, in sustaining the contrary in its relative complaint, places itself in contradiction to the said Petroleum Law, the application of which that Secretariat is obligated to carry out.

The thesis that is sustained to the effect that the rights of the company,

with regard to which confirmation has not been solicited, should be held as legally waived, in accordance with the provisions of Article 15 of the Petroleum Law, is inadmissible. In effect, the law grants a term of one year for the presentation of a petition for confirmation of rights and that term cannot have run for the plaintiff company, because if such confirmation could not be issued for more than fifty years, in accordance with the final paragraph of fraction II of Article 14 of the law, and if this limitation implies restriction or partial loss of the rights which its titles, issued prior to May 1, 1917, give to the company, it is evident that such petition could not be made by the plaintiff without damage to that which is within its patrimony; for such petition for confirmation would imply a submission to the limitation above mentioned. If it is indisputable that the confirmation of a right is the express recognition of the same, to limit it in the terms of the said Article 14 is to modify that right instead of confirming it.

Consequently, if the plaintiff company could not solicit the confirmation of its preëxisting rights without limiting them as to term, it is beyond doubt that it is indispensable that this restriction must first disappear; and consequently the term of one year set out by Article 15 could not have elapsed, due to the impossibility which has been mentioned.

As the Secretariat of Industry and Commerce, contrary to the conclusions above expressed, revoked the permits which had been issued to the plaintiff company, basing such action on the lapse of the term referred to, without taking into consideration the unconstitutionality of the limit of fifty years, which was a condition fixed for the confirmation, there is no room for discussion that the revocation order complained of violates in this regard the guarantees in favor of the plaintiff which are set out in Articles 14, 16 and 27 of the Federal Constitution.

Finally, it is claimed that the judge failed to consider the clause contained in the revoked permits relative to the provisional character of the same, and that they were subject to the provisions contained in the Petroleum Law. As to this, it must be observed that the decision treats of this question, and consequently the contention of grievance is without foundation. But even if that alone would be sufficient to dismiss the action, it is in order to establish the fact that the permits revoked, even though they had a provisional character, were conceded under the fundamental consideration that the petitioning company had rights to allege and of the kind set out in Article 14 of the Petroleum Law, and that there has still been no legal examination made of those rights which would permit their non-existence to be affirmed in accordance with Article 14. In addition, the observance of the Petroleum Law, as unrestrained, however free and spontaneous as it may be supposed, cannot be referred to except as to those provisions which are constitutional; for by any other manner of reasoning the absurdity would have to be accepted that individual guarantees can be renounced, a thing which has been

proven at law cannot be done, and which constitutes a basic provision of our constitutional law.

AND, WHEREAS:

THIRD: The District Attorney affirms that the rights which the plaintiff company states it has were not proven and that as the decision of the District Judge accepts them as if they were so proven, injury is caused him. In the hearing at law the Mexican Petroleum Company exhibited various certified copies referring to the acquisition of various parcels of land for the purpose of carrying on exploration for petroleum purposes, and in addition rendered an informatory testimony as proof of regular works carried on in the lands in question, which is sufficient to hold it as injured for the effects of the *amparo* action; for this constitutional action at law is not the place in which the pretended property rights should be discussed, and still less to openly disown them to the plaintiff company. Such examination of rights should be made when the petition for confirmation is presented to the Secretariat of Industry and Commerce. Consequently, if the company has not had the opportunity of having the rights in question examined, the grievance set out by the District Attorney cannot be accepted.

AND, WHEREAS:

FOURTH: Having analyzed the grievances which the responsible authorities and the District Attorney allege, we should enter into a study of the violations complained of in the petition for *amparo*, with the exception of that relative to the limitation of time, contained in Article 14, that point having already been taken up in one of the preceding clauses.

The plaintiff company alleges that the sole provision which imposes the obligation to solicit the confirmation constitutes a violatory act, from the moment in which it cannot be agreed to, except by means of a new concession which the company deems it is not in order to solicit, as it is in enjoyment of relative rights by virtue of its titles and of perfectly valid authorization obtained prior to the Petroleum Law.

Juridically the grievance above set out cannot be sustained, for the Secretariat of Industry, Commerce and Labor violates no guarantee on requiring that confirmation of the rights be asked for, for Article 14 of the Petroleum Law only refers to the recognition of those acquired rights without any substantial alteration. Therefore, the requisite of confirmation is only a procedure in regard to tenure (*modalidad*) imposed by the legislative body for the use and exercise of those rights for reason of public order and precisely to safeguard them. If such rights were to be confirmed by operation of law and no manifestation would have to be made, it would result in great difficulty and impossibility in many cases to ascertain if the rights were still in the original state or if by some circumstance that state has been changed.

This procedure has been followed in similar cases in our legislation and we can cite the provisions of the law governing Waters of Federal Jurisdiction, which ordered the confirmation of the rights for the use and enjoyment of the same, which prior to that time had been under local jurisdiction, and which, by virtue of the new law, passed to federal jurisdiction; establishing that such confirmation would be made in the manner prescribed in the law which was that of obliging the user to address a petition to the Secretariat of Development (*Fomento*) to obtain the confirmation of his rights—a means employed by the legislative body to ascertain the state of use of public waters, the number of users in existence, their domiciles and boundaries, and thus be in a position to exercise the vigilance and other functions which the laws impose on the authorities, and for which they would be incapacitated if they did not have the information above set out.

Similarly, the Secretariat of Industry, Commerce and Labor must have some means by which there will appear before it the various title owners covering petroliferous lands, that it may know the nature and extent of the rights, confirming them without any cost whatsoever, in accordance with the provisions of paragraph I of Article 14, by means of a recognition which is nothing more than the formal expression of the confirmation of rights already acquired, and those to which the Petroleum Law refers.

Therefore, the rights of the plaintiff company are in no manner affected by a confirmation which does not modify them but does recognize them, always provided the requisites set out in Article 14 of the said Petroleum Law in its fractions I and II, and the obligations contained in the respective titles, have been complied with.

AND, WHEREAS:

FIFTH: Moreover, it is not doubtful to anyone that petroleum and its derivatives constitute one of the riches most sought after by industry and commerce, and that its producing zones are of a limited and reduced area. In a strip frequently narrow many and varied industries intermix and develop, such as modes of transportation over and under the soil, industries for the transformation and reducing to possession of petroleum, and exploration and exploitation works. All of these activities, far from being carried out in complete harmony, touch at various points and even clash and enter into conflict. Hindrances and invasions result which the public authority has the inevitable duty to prevent and regulate. This activity cannot be regulated humanly or rationally without a scientific knowledge, without knowing it exactly, and identifying the conflicting interests and the manner in which they develop. For this knowledge, the first step is the confirmatory registration, which does not damage nor modify the rights substantially, but merely tends to authenticate them and make sure of them, thus permitting the public authority to coördinate them peacefully and wisely.

The great collection of people in the reduced area of the towns has produced the present phenomenon which is observed in all big cities, that is, that the land is used to the last millimeter for the erection of large constructions, huge buildings in which are housed hundreds and thousands of persons, and in spite of the undeniable right of the owner of the building to utilize his property and of the rights of the tenants to enjoy the inviolability of their residence without being molested in any way, the public authority establishes a vigilance therein—police, sanitary and other regulations—without this being regarded by any one as an offense or a violation to the domicile or to the property. And in an analogous case, the legislator had without doubt a similar purpose as concerns the petroleum zone in which the agglomeration of people, of activities and conflicting interests, open or dormant, imposes upon him the duty of taking opportunely measures of social welfare for better living conditions, apart from the fact that the essential object for the issuance of confirmatory concessions is to give the State the regulation and intervention which Article 27 of the Constitution grants it.

For the reasons given, and based upon Articles 103, Fractions I and 107, Fraction IX, of the Federal Constitution, and Article 86 and other relative articles of the Reglamentary Law of *Amparo*,

IT IS RESOLVED:

FIRST: The decision of the District Court in the *amparo* suit to which this proceeding refers is confirmed in the following terms:

SECOND: The Justice of the Union protects the Mexican Petroleum Company of California against the acts which it complains of, and which consist in the revocation of the permits executed by the Secretariat of Industry, Commerce and Labor for the drilling of wells "Mendez No. 272," "Chijol No. 63" and "Dicha No. 104," in the lands of the extinct Hacienda of Chapacao, Municipality of Panuco, State of Vera Cruz, said revocation being based upon Articles 14 and 15 of the Organic Petroleum Law, covering Article 27 of the General Constitution, and in applying the sanction established by said Article 15.

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO*

H. G. VENABLE *v.* MEXICO (Docket No. 603)

Opinion rendered July 8, 1927

Mexico held directly responsible for the action of a superintendent of the National Railways in illegally preventing from leaving Mexico certain American-owned railway engines,

* Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, *Presiding Commissioner;* Fred K. Nielsen, *Commissioner;* G. Fernández MacGregor, *Commissioner.*

Headnotes, footnotes, and summaries, supplied by the Managing Editor of the JOURNAL.

the return of which to the United States was required under a contract of lease to an American company operating a freight transportation business over the National Railways of Mexico, which American company was about to be placed in the hands of a receiver.

The fact that the railway superintendent was unaware of the existence of the contract of lease would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) did without right or authorization. Direct responsibility for acts of executive officials does not depend upon the existence of aggravating circumstances such as outrage, wilful neglect of duty, etc.

Mexico held indirectly responsible for damages to the locomotives while in the custody of the Mexican receiver. In countries with bankruptcy legislation such as Mexico, direct responsibility for what happens to the bankrupt estate lies not with the government, as the law intentionally refrains from laying the heavy burden of this responsibility on the personnel of the courts; but because they are not the custodians, a heavy burden of indirect responsibility lies upon them. The court at Monterrey having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. Nor can the court exculpate itself by alleging that the claimants did not apply to it in order to have these wanton acts investigated and to have the necessary action taken against the perpetrators of crimes and the unreliable custodians. Such things are an essential part of proper governmental action and cannot be made dependent upon private initiative.

Counsel: United States, Bert L. Hunt; Mexico, E. Martínez Sobral, Assistant Agent.

VAN VOLLENHOVEN, *Presiding Commissioner:*

1. This claim is asserted by the United States of America on behalf of H. G. Venable, an American national. On April 18, 1921, a company of which Venable was president had, together with a company of which one E. S. Burrowes was president, entered into a contract with the Illinois Central Railroad Company at Chicago, Illinois, U. S. A., for the rental of some locomotives to them for use in Mexico, and a few days before, on April 13, 1921, Burrowes in his personal capacity had entered into another contract with the Mexican National Railways allowing him to use the Mexican tracks with these locomotives. About April 20, 1921, four locomotives were delivered, and in May they entered Mexico. On July 22, 1921, however, the Central Company under the contract requested the return of these four engines; in case of failure to do so either Burrowes' company or Venable's company—the choice between them to be made by the Central Company in its discretion—would be subject to a high penalty. When, for this reason, Venable tried to have the engines leave Mexico, a Mexican railway superintendent by name of C. C. Rochín intervened, at Burrowes' request, by a telegram of September 3, 1921, which forbade his railway personnel to allow these engines and ten other ones to leave Mexican territory; and from September 3 to 7, inclusive, 1921, the four locomotives were several times attached by the court at Monterrey, Nuevo León, Mexico, for liquidated debts of Burrowes' company. On September 17, 1921, Burrowes' company, at Venable's request, was declared a bankrupt, the attachments then being consolidated for the benefit of the bankruptcy proceedings. Repeated demands made by Venable failed to effect the release of the engines; on the con-

trary, they were retained in the railway yard at Monterrey, where, after a few months, three of them appeared to have been deprived of so many essential parts as to have become practically useless. Even before these occurrences, on August 21, 1921, one of the four engines had been wrecked in a railway collision for which, it is alleged, Mexico is liable. Since finally Venable had to indemnify in the sum of $154,340.10 the National Surety Company, which had secured the Central Company against its losses; and since he had incurred other expenses in connection with the facts which constitute the basis of this claim, the United States alleges that Mexico is liable to him in the amount of $184,334.84, with interest thereon, on account of direct responsibility for Rochín's injustice, direct or indirect responsibility for the court's action, direct responsibility for three engines having been destroyed in the railway yards, and direct responsibility for one engine having been destroyed in a collision.

2. As to the nationality of the claim, which is challenged, reference may be made to the principles asserted in paragraph 3 of the Commission's opinion in the case of William A. Parker (Docket No. 127), rendered March 31, 1926.[1] On the record as presented, the Commission should hold that the claimant was by birth, and has since remained, an American national.

3. In order successfully to analyze the facts in this case, it is indispensable to establish first the contents of three contracts. The first one, a railway traffic contract of April 13, 1921, between, on the one part, the National Railways of Mexico (under government control) and, on the other part, Burrowes, was the contract under which the railway company was to use its tracks for the transportation of merchandise of Burrowes and to this end to use the locomotives imported or otherwise controlled by Burrowes. By the second contract, that of April 18, 1921, the Illinois Central Railroad Company agreed to lease, for use in the handling of freight traffic on certain lines of the National Railways of Mexico, six locomotives, to a combination of two companies, (*a*) the Burrowes Rapid Transit Company (Burrowes, president) and (*b*) the Merchants Transfer and Storage Company (Venable, president). In fact, as stated before, only four engines were delivered. The third contract is that of the same date of April 18, 1921, between the Illinois Central Railroad Company on the one part and, on the other part, Burrowes' company, Venable's company, and the National Surety Company, in which the three companies severally obligated themselves to a penalty of $150,000.00 in case of nonfulfilment or improper fulfilment of the return of the engines under the contract.

4. About April 20, 1921, four locomotives were delivered by the Central Company to Burrowes' company and Venable's company at New Orleans, Louisiana, U. S. A.; and from the middle of May, 1921, to July 22,

[1] Printed in this JOURNAL, Vol. 21 (1927), p. 174.

1921, they apparently operated in Mexico without any occurrence or accident.

Burrowes and Venable

5. Before examining the details of this complicated case it may be prudent to make a preliminary remark. The record before the Commission doubtless reveals a series of acts on the part of Burrowes which attempted to injure Venable's business interests; acts in which Burrowes saw fit to involve Mexican authorities, either with or without fault on their part. The record, however, does not disclose Burrowes' motives and views. Apparently between May, 1921, and August, 1921, a serious friction had developed between the two men. Was Burrowes the first of them to attempt measures against the other? There is something quite enigmatic in the position taken by the Illinois Central Railroad Company. On July 22, 1921, it forwarded to Burrowes' company a *telegram* demanding the return of the four locomotives *within fifteen days*, i. e., on or before August 7; but in the fall of 1921, when it was advised that it could receive these engines from Monterrey if only it applied to the court, it declared that it had no interest in doing so; and even as late as the first part of November, 1921, it did not show anxiety to have them. It would, therefore, seem to be not altogether improbable that the Central Company had not in July, 1921, requested the engines on its own initiative and from its own desire, but on the instigation of some one else. The locomotives were indispensable for the private freight transportation business Burrowes was conducting in Mexico; in a telegram of August 29, 1921, Burrowes contended: "Rapid Transit blown up action Venable and Waldrop" (Waldrop was the vice president both of Burrowes' company and of Venable's company); and it is clear from the record that late in August Venable was trying to have the engines returned to the United States without consulting Burrowes or informing him. In the same way Burrowes' instigating executory processes and attachments *in Mexico* against his own corporation may have been a counteract against Venable's request of a receivership before the *Texas* court. This means that it is not for this Commission—and that, on the record as it stands, it could not even do so with knowledge of facts—to consider whether Venable is justified to complain of Burrowes' attitude, or whether Burrowes might have been justified to complain of Venable. The Commission should eliminate all considerations of moral approbation or disapprobation of what either American citizen planned and did, and merely inquire whether Burrowes, in the course of execution of his scheme, induced Mexican authorities or others acting for Mexico to perform on their part acts resulting in injustice toward an American citizen, or even whether these authorities did so spontaneously.

Rochín's telegram

6. The first question before the Commission is that concerning Rochín's telegram of September 3, 1921; whether he was obliged or entitled to send it. It was argued by Mexico before the Commission, on the one hand, that Rochín in forwarding this telegram had in view the safeguarding of interests and rights of the National Railways of Mexico; that he did so under the provisions of the railway traffic contract of April 13, 1921; and that in doing so he executed a *right*, not a duty. On the other hand, however, it was alleged by Mexico that Rochín merely acted under instructions from the owner of the locomotives or the man whom he might consider to be so (Burrowes), that he only meant to safeguard interests and rights of this private American citizen, and that it was his *duty* to do so, since a refusal on his part to act would have amounted to an interference in Burrowes' private affairs quite as much as his action did. There has not been alleged that Rochín acted under the emergency provision of Article XXI of the railway traffic contract, nor that he acted in connection with temporary exportation permits granted Burrowes' company by Mexico.

7. It would seem untenable to maintain that Rochín in sending his telegram acted under Article VI and VII of the contract providing that no Burrowes cars should be removed or rebilled until such unpaid freight charges as were due to the National Railways of Mexico should have been liquidated. If this had been the motive for his action, the evidence doubtless would have shown (*a*) that he had personal knowledge of the existence of unpaid charges in a sum of some importance, (*b*) that the order purported to prevent the "removing or re-billing" of the cars, (*c*) that the order would be canceled after payment of said charges, and (*d*) that, when the Burrowes Rapid Transit Company was declared a bankrupt, he (Rochín) joined the other creditors and presented his claim. For none of these contingencies is there proof or even probability. As to non-payment of due charges, there is nothing in the record except one Toussaint's statement of September 2, 1921, to Rochín's assistant Carpio that Burrowes' company was on the verge of bankruptcy, that he advised him to protect the interests of the National Railways with respect to unpaid freights, and that he did not know the amount due. A statement made by Venable to the District Court at Laredo, Texas, U. S. A., on September 1, 1921, that Burrowes had collected freights in advance on property being transported by Burrowes' company "and not paid same to coöperating railway lines, as he should have done," can not possibly have been known to Rochín on September 3, 1921, and neither contains the necessary elements for any governmental action. In the second place, Rochín's order did *not* prevent "removing or re-billing" of the cars, but exclusively their leaving Mexican territory. In the third place, the telegram did *not* establish that it would lose its effect once the charges would

be paid, but it merely referred to an ulterior authorization by Ocaranza Llano, who was Director General of the National Railways of Mexico and Rochín's chief in the railway management. In the last place, no claim in the bankruptcy proceedings against Burrowes' company was filed by the National Railways until some time between 1922 and March, 1926, and then for an amount of 12,957.63 Mexican pesos, for the payment of which sum it would not have been necessary to retain fourteen locomotives. From all of this there can only be one conclusion, to wit, that Rochín's telegram did not purport to protect any claim of the National Railways as against Burrowes' company.

8. There remains the other possibility, that Rochín acted under instructions from the man who apparently controlled the locomotives and whom he may have considered to be the owner, and that he even was obliged to obey these instructions. The evidence before the Commission would seem to render this second explanation improbable. If Rochín had acted with this purpose, it would have been but natural for him to wire "do not permit the engines to cross the border unless Mr. Burrowes authorizes it," but he did so only on or about September 23, 1921, even then not saying "Burrowes" but "the owner." Instead of that, he ordered on September 3, not to release them "unless Mr. Ocaranza authorizes it." If Rochín had wired on behalf of the owner, there might have been expected some explanation by Burrowes regarding the reason why he could not act himself, and what was the name of the Mexican railway official who disobeyed his legitimate orders, and on what ground he disobeyed. Instead of that, Toussaint's letter of September 2, 1921, only establishes that the Mexico office of Burrowes' company had been the victim of some undisclosed frauds on the part of their managers at the boundary. If Rochín had wired on behalf of the owner, there might have been expected the production of some evidence which locomotives were either owned by Burrowes or under his control; instead of that, there is nothing except a unilateral statement in Toussaint's letter of September 2, 1921, designating the four locomotives rented from the Central Company and ten other engines. If Rochín had wired under instructions of the owner, he could only have ordered a measure the owner was entitled to order; and there can be no doubt but that a prohibition to let movable property leave the country except by authorization of a high government official (Ocaranza Llano) was a remedy which could not have been applied by Burrowes himself. Rochín certainly was under no duty to comply with Burrowes' demand. There is no provision whatsoever in the contract either obliging the National Railways to act for the interests of Burrowes' company (apart from allowing them to use their tracks), or authorizing the National Railways to apply in behalf of Burrowes any remedy which Burrowes could not apply himself. Rochín being an official in an important and responsible position should have understood, supposing even that he was entirely unaware of

Burrowes' intentions, that it might be dangerous for him to act as he did without having acquired sufficient information as to the reasons for Burrowes' request, at first sight inexplicable; the more so as he was advised that Burrowes was on the verge of being declared a bankrupt (as a matter of fact not bankruptcy, but receivership had been ordered on September 1, 1921), and as he should have realized the uncertainty as to Burrowes' rights to dispose of his effects at the time he applied to Rochín. If Burrowes some day had cabled to Rochín "see to it that fourteen locomotives in which my company is interested immediately leave Mexico," is it thinkable that Rochín would have used his official power to obey this command, or would he not have left this affair entirely to the activity and responsibility of Burrowes himself?

9. It is true that Rochín under the contract was not obliged to consider other American contract rights than those of Burrowes' private freight transportation business. But acting outside of the contract, he should take care not to violate other contract rights vested in any national or foreigner. If, acting without right or authorization, he damaged any such contract right—in the present case, Venable's—his being unaware of its existence would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) illegally did. Direct responsibility for acts of executive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, willful neglect of duty, etc.

10. What was the damage caused by Rochín's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921, were in good condition, and of part of the mishap with the fourth engine which had been wrecked in August; though it is uncertain where the three engines were on September 3, and whether they might not at the time of the attachment by the court have been on Mexican territory even without Rochín's telegram. It is clear, however, that only those damages can be considered as losses or damages caused by Rochín which are immediate and direct results of his telegram; see the award in the *Lacaze* case between Argentine and France under the decree of December 17, 1860 (De Lapradelle et Politis, II, 298), and paragraphs 13 and 14 of the first opinion in the *Francisco Mallén* case (Docket No. 2935).[2] Every day of delay in returning the four engines to the Illinois Central Railroad Company might have caused the claimant's company a loss of $140.00 and, apart from that, obstacles against his returning them after August 7, 1921, might have resulted in imposing on the said company an obligation to pay the $150,000.00 due under the contract in case of nonfulfillment or improper fulfillment of the duty to return the engines in good condition and in time. An element of uncertainty, however, proceeds from the fact that the Illinois Central Railroad Company

[2] This JOURNAL, Vol. 21 (1927), pp. 809–810.

never claimed any amount of $140.00 per day for the period elapsed after August 7, 1921; and that it was not until November 15, 1921, after all of the important events subsequent to Rochín's telegram had occurred, that the Central Company really claimed the contractual penalty for the four engines. It is difficult, therefore, to make the money value of the damage caused by Rochín's act the object of a precise calculation.

The bankruptcy proceedings

11. The second problem before the Commission is that concerning the attitude of the State Court at Monterrey, Nuevo León, in its bankruptcy proceedings against Burrowes' company.

12. On July 22, 1921, the Central Company had requested the return of the four engines, a request which if complied with (as was Burrowes' duty) apparently would have destroyed an important part of Burrowes' transportation business. On August 1, 1921, Burrowes' company had taken over the similar business of the Brennan, Leonard and Whittington Transportation Company, including the use of ten more engines. On September 1, 1921, Venable, before the 49th Judicial District Court of Texas at Laredo, Texas, had requested the appointment of a receiver for Burrowes' company, and this request had been granted the same day. On September 1 and 2, 1921, one R. L. Bateman, a creditor of Burrowes' company, requested the said court at Monterrey to attach the property of Burrowes' company for a liquidated and unpaid debt. Bateman's request appears to have suited Burrowes' plans; instead of opposing it, he recognized at his earliest opportunity—on September 3, 1921, late in the afternoon—that indeed he had discontinued paying his debts. The relation between the requests made at Laredo and at Monterrey has been touched upon in paragraph 5. On September 15, 1921, Venable demanded the court at Monterrey to adjudicate the bankruptcy of Burrowes' company; the court granted this request on September 17, 1921, appointing a lawyer, Leal Isla by name, provisional *síndico* (trustee) and one Morales Gómez *interventor* (controller or supervisor). Leal was the Monterrey lawyer of the National Railways of Mexico.

13. The legal difficulties had begun when on September 3 to 7, inclusive, 1921, goods belonging to the debtor company had been attached by the clerk of the court. Under Mexican law creditors are entitled to point out which effects they desire to see attached, and the debtor has the right to present objections. In the present case Burrowes as president of the debtor company designated for attachment "the entire business represented by him" (*toda la negociación por él representada*); whereupon Bateman and, after him, some other creditors demanded that, apart from a few goods of minor importance, out of the fourteen locomotives controlled by Burrowes' company —see paragraph 7—either the four engines leased by the Central Company or the three undamaged ones should be attached. The clerk of the court did

not inquire whether they were part of "the entire business" of the debtor company, but merely established that Burrowes had three days to object to said execution. Burrowes never objected, but, on the contrary, requested that "the properties designated by the parties and which are enumerated in the foregoing writ of attachment" be declared "to be formally attached." So the court did on September 3, 1921, and following days. On September 17, 1921, these several attachments were consolidated into one attachment for bankruptcy.

14. In attaching the four engines for the debts of a company which did not own them the clerk of the court may have made the slight oversight indicated in paragraph 13; but the mistake is entirely due to an unreliable statement of Burrowes. No fault can be imputed to the court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the *Neer case*, Docket No. 136, rendered October 15, 1926).[3]

15. The present claimant, Venable, then began his determined efforts to get these four engines free from the attachment. In order to be represented among the creditors and to be entitled to request bankruptcy proceedings, he bought, on the advice of his Mexican lawyer, the claim of one of the company's creditors, the firm of A. Zambrano e Hijos. It has been argued by Mexico that, acting on the advice of his Mexican lawyer, he failed to take the steps required by Mexican law in the forms required by Mexican law, and took other steps which according to the laws of procedure and bankruptcy never could make him attain his end. It is most unsatisfactory to state that he was the victim of either lack of knowledge or of application on the part of his lawyer; but Mexico can not be held liable on that ground. He moreover was the victim of the fact that the Illinois Central Railroad Company, which successfully could have required the release of the engines in the Monterrey court, was unwilling to act (see paragraph 5).

16. Of these court proceedings four parts would seem open to criticism. When Venable instituted a suit against the *síndico*, the court, instead of clinging to the periods of the law, accepted an answer filed by this *síndico* fifteen days late. In the second place, the judge in the court room had private conversations on the case with Venable, his lawyer, and the *síndico*, in which he indulged in making a kind of informal ruling as to the party authorized to claim release of the engines (the Central Company only), but in which he never told the claimant that he did not live up to the forms of Mexican law and that there lay his trouble. It would seem more appropriate for a judge not to allow such interviews; but once he does, he should not be silent on a vital point which he might have indicated without committing himself. In the third place, a request of the court itself addressed to the Mexican Land Registration Office on October 28, 1921, was allowed to re-

[3] This JOURNAL, Vol. 21 (1927), p. 556.

main unanswered, though a reply was indispensable for the continuation of the suit filed by Venable against the *síndico*. In the fourth place, the court did nothing to bring the bankruptcy proceedings to an end, allowed them to remain at a standstill, did not direct the *síndico* to account for his acts nor for the custody of the goods trusted to his care. The first of these four objectionable acts can not be said to amount to so serious a deviation as to constitute a mal-administration of justice as mentioned at the end of paragraph 14. Nor can the second and third acts. The fourth act will be considered under paragraph 23. As to the details of the court proceedings, I refer to paragraphs 4 to 13, inclusive, of Commissioner Fernández MacGregor's opinion, in which I concur.[4]

17. Supposing the choice of Leal as *síndico* was not a happy one, the court can certainly not, on the record, be blamed because of the mere fact that a lawyer of the most important railway corporation was chosen as trustee in the bankruptcy proceedings against a company doing business relative to railways. Leal's proposal of October 4, 1921, temporarily to lease the engines to one of two applicants both alien to the National Railways can not be represented as meaning a prejudiced act intending to promote, not the interests of the estate, but of his railway corporation.

18. Since for those parts of Mexican law which are involved in the present case much depends upon the knowledge and trustworthiness of lawyers, satisfactory results of the administration of justice are not to be expected if, indeed, as it would appear from the record, even in important centres of Mexican life lawyers of good standing are not or were not up to the usual standards. Statutes following the type of French law, as it was adopted in Napoleon's day, can not work well unless the lawyers in the country where such statutes are in force correspond to what lawyers were and are in France and similar countries; and if a nation can not feel sure of that, it should in its legislation grant a larger power to its judges, even in civil suits, as has been done in the legislations of parts of Asia, where the same difficulty existed.

19. The conclusion should be that the court proceedings at Monterrey, though presenting an unattractive picture of how legal provisions were allowed to be misused in support of bad intentions, do not show a defective administration of justice such as might give ground for their being stigmatized by an international tribunal.

The destruction of the three engines

20. On September 3, 1921, the four locomotives, three of which had continued to be in good operating condition, were attached for debts of Burrowes' company; on September 17, the attachments were consolidated and the engines were given in custody to a *síndico* or bankruptcy trustee. From September 3, 1921, until further provision to the contrary, the owners and other private persons interested in the engines lost their power over them.

[4] Omitted from the JOURNAL.

It is established by the record that the engines at all times were left in an unprotected position, exposed to the weather; that up to October, 1921, they had been well preserved; but that before June, 1922, and particularly before June, 1925, so many parts of prime importance had been removed or injured that the engines had been reduced to a practically worthless condition. The question before the Commission is whether under international law these circumstances present a case for which a government must be held liable.

21. There could have been no hesitation to answer in the affirmative if the goods had been taken into custody by Mexican officials or other persons "acting for" Mexico. Then a direct responsibility of the government would have been involved. In paragraph 4 of its opinion in the *Nick Cibich* case (Docket No. 14) the Commission held that Mexican police officers having taken a man's money into custody must account for it and would, apart from further complications, render Mexico liable if they did not. In paragraph 3 of its opinion in the *Quintanilla* case (Docket No. 582)[5] the Commission held that, once a government has taken into its custody war prisoners, hostages, interned soldiers, or ordinary delinquents, it is obliged to account for them. The opinion in the *Toberman, Mackey & Company* case (Docket No. 17)[6] has no bearing on the present problem, since a real custody of imported goods in the hands of customhouse officials was held not to have existed in that case. In the *Lord Nelson* case[7] before the British-American arbitral tribunal the United States was held responsible for the embezzlement of funds in custody of the clerk of a federal court (Nielsen, *Report*, 433–434).

22. The present situation, however, is different. When a court places a bankrupt estate in the custody of some kind of trustee (in Mexico, a *síndico* and an *interventor*), it does the same thing for an estate that it does for specific goods of a debtor when allowing a plaintiff to attach them in order to preserve for his benefit property on which eventually to execute a future award rendered in his favor. Such goods are not taken into custody by the courts themselves; a private citizen is appointed trustee, acting for the benefit of the plaintiff, or the plaintiff himself is appointed for this purpose. Likewise, in many countries a bankruptcy trustee, such as the Mexican *síndico*, can not be considered as an official, or as one "acting for" the government; he acts "as representative of the creditors" (Ralston, *Venezuelan Arbitrations of 1903*, 172). The *Institut de droit international*, in the rules on bankruptcy law it adopted in 1902 in its session of Brussels, styled persons like this Mexican *síndico* "the representatives of the estate" (*les représentants de la masse;* Articles 4 and 5). The draft convention on bankruptcy law inserted in the final protocol of The Hague conference on private international law of October–November, 1925, attended by delegations from twenty-two states (including Great Britain), established in its Article 4 that the syndic can take

[5] This JOURNAL, Vol. 21 (1927), p. 569.
[6] This JOURNAL, Vol. 22 (1928), p. 182.
[7] This JOURNAL, Vol. 8 (1914), p. 659.

all conservatory measures or administrative measures and execute all actions "as representative of the bankrupt or of the estate" (*comme représentant du failli ou de la masse*). It is true that the British delegation left this conference before its close, but not because of any difference of views as to the position of the trustee; and, moreover, in the present case the position of the bankruptcy trustee should be considered in the light of Mexican, not of Anglo-Saxon, law. In countries with bankruptcy legislations such as the Mexican code contains, direct responsibility for what happens to the bankrupt estate lies not with the government. In the present case it rested either with Familiar, a railway superintendent at Monterrey, under whose care the engines had been placed at the time of their attachments and under whose care they had been left on October 4, 1921, by the *síndico* Leal; or the responsibility rested with this *síndico*, appointed by the court on September 17, 1921, or with the combination of *síndico* and *interventor*. Laws like that of Mexico intentionally refrain from laying the heavy burden of these responsibilities on personnel of the courts. I concur with respect to the problem of the position of the Mexican *síndico* in paragraph 16 of Commissioner Fernández MacGregor's opinion.[8]

23. Though the direct responsibility for what befalls such attached goods does not rest with the courts and the government they represent, because these are not the custodians, a heavy burden of indirect responsibility lies upon them. The government obligates owners and other persons interested in certain goods to leave the care of these goods entirely to others; it temporarily excludes these owners or other persons interested from interference with their goods; it constrains them to allow custodians to handle them as these custodians think legal and fit. Here, conformably to what was held in the *Quintanilla* case, a government can not exculpate itself by merely stating that it placed the goods in someone's custody and ignores what happened to them. The court at Monterrey had "to provide for the preservation of the bankrupt estate," and the appointment of a provisional *síndico* and of an *interventor* had this special purpose (Article 1416, Mexican Code of Commerce of 1889). Through the *interventor* the court could execute its control on the acts of the *síndico*. Through the prosecuting attorney the court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable space of time. The court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft in a most wanton form, the less excusable since it could not have been accomplished unless by using railroad machinery specially adapted for such purposes as the dismantling of locomotives, no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required from the custodian appointed by the *síndico*, nor from the *síndico* himself, and nothing was done

[8] Omitted from the JOURNAL.

to have the bankruptcy proceedings wound up. Even if here was not willful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. Nor can the court exculpate itself by alleging that no American citizen has applied to it in order to have these wanton acts investigated and to have the necessary action both against the perpetrators of crimes and the unreliable custodians started; to do such things is an essential part of proper governmental action and can not be made dependent upon private initiative.

24. The three engines according to the contract of April 18, 1921, between the Central Company, Burrowes' company, and Venable's company were valued at $37,500.00 each. In October, 1921, an American expert calculated their value somewhat higher, to wit, at $40,000.00 each. A proposal of the *síndico* to have the engines rented out (paragraph 17) was opposed by Venable and was never allowed by the court; being kept unused in the railway yards, even when well protected, their value must have somewhat decreased, the custodians not being obligated to spend money in order to keep them in a first-class condition. It would seem proper, therefore, to consider the loss sustained because of the destruction of the three engines as amounting to the original valuation of $37,500.00 each, or a total of $112,500.00. In case of direct responsibility for engines under its own custody, Mexico should have had to indemnify in this sum, unless the occurrences could be ascribed to an irresistible calamity. Here indirect responsibility only can be fastened upon Mexico. The engines, however, were destroyed not by an act of God, but by criminal acts of men. The results of the acts were not secret or hidden; they were under the eyes of all the railway officials at Monterrey, who at the time were government officials. The crimes must have been committed not by private means, but by using railway machinery, which at the time was government machinery. It is not for the Commission to investigate who had the benefit of these removals; but there is high probability that the valuable parts of the engines were added to other engines proceeding from the same plants, as were the ninety-one locomotive engines sold by the Central Company to Mexico on April 23, 1921, and gradually delivered at New Orleans from shortly thereafter to June 28, 1921 (record of Docket No. 432). Considering all these points, the amount due because of this indirect government responsibility may be fixed at $100,000.00 without fear of being unjust or unequitable.

25. The respondent government has not denied that, under the Convention of September 8, 1923, acts of courts of Nuevo León may give rise to claims against the Government of Mexico. The Commission has repeatedly held that claims may be predicated on acts of state authorities.

The wrecking of the fourth engine

26. On August 21, 1921, one of the four engines had been wrecked in a collision on the railway track between Saltillo, Coahuila, and Monterrey, Nuevo León. Both colliding trains were operated by crews of the National Railways of Mexico (under government control); it is, therefore, irrelevant which crew was at fault. But were the National Railways liable for the accident? Article XXIII of the railway traffic contract of April 13, 1921, establishes that "the Railways will not be responsible for the damage suffered by locomotives, the cars or their contents by reason of accidents, fire—or for any other cause of superior force, the Second Party Contractor waiving for this effect the Articles Nos. 1440, 1442, and 2512 of the Civil Code of the Federal District." It is difficult to consider as convincing evidence of fault a mere statement proceeding from one of the mechanics that the other train was running without, or contrary to, orders. I therefore concur on this point, in paragraphs 19 to 21, inclusive, of Commissioner Fernández MacGregor's opinion.[9]

27. The impossibility to return this engine in good condition to the owner (the Central Company) made the lessees liable, under their contracts of April 18, 1921, to an indemnification of $37,500.00, which was actually paid. An expert estimate made on September 15, 1921, on behalf of the National Railways of Mexico stated that to put the engine in good condition would need repairs in the approximate cost of 21,000.00 Mexican pesos. It therefore would seem proper to consider the value of the engine after the collision as having amounted to $37,500.00 minus the approximate equivalent of 21,000.00 pesos (viz., $10,500.00), resulting in $27,000.00. There is no evidence that, while in the Monterrey yard, this wrecked engine had some of its parts removed. Instead of ordering, under Article IX of the Convention of September 8, 1923, that this fourth engine be restored to Venable, it would seem in keeping with the interests of both parties to award on its account an amount in money representing its value ($27,000.00) increased with a sum representing interests from the uncertain date on which, if the bankruptcy proceedings had been terminated in due time (see paragraph 23), the status of this engine would have been decided.

Venable's present rights in the four engines

28. Since there is no controversy between the two governments that rights in the engines are vested exclusively in Venable at the present time

[9] Omitted from the JOURNAL.

and that they were so at the time he filed his claim, it is only necessary to indicate how he acquired them. The ownership of the engines was from the beginning in the Illinois Central Railroad Company. On August 15, 1922, it passed to Venable because of their transfer to him by the National Surety Company, which had paid $154,340.10 to the Central Company under the bond proceeding from the third contract mentioned in paragraph 3 above. Venable, however, did not pay in 1922 to the National Surety Company more than $50,780.65, was sentenced on March 6, 1923, to pay to this corporation an additional sum of $111,743.83, and satisfied this judgment on December 7, 1926. Potential rights of three insurance companies in the engines were surrendered to Venable in contracts of July 7, 10, and 11, 1922, between them and the claimant.

Other items claimed

29. Venable, moreover, claims an amount of $1,250.00, representing the sum paid by him for the claim of one of the creditors of Burrowes' company (A. Zambrano e Hijos), bought in order to enable him to request bankruptcy proceedings. Mexico can in no manner be held liable for this expense.

30. Venable claims fees of attorneys whose services he engaged either in Mexico or in the United States, in the total sum of $20,294.74. In as far as these expenses are merely consequences of the attachments directed against Burrowes' company, they can not be linked with any illegal act of Mexico; but he should be compensated for them in as far as they relate to action taken after the deterioration of the three engines in the Monterrey railway yard had been discovered. The amounts claimed for such action of attorneys correspond with items 11 and 12 of Venable's list concluding the memorial, and with part of the amount under 10, in the sums of $648.52, $797.79, and $2,000.00 (four monthly payments), in total, $3,446.31.

31. Venable claims expenses for several trips, made by himself and others, in the amount of $8,450.00. The trips made since the deterioration of the three engines was discovered caused the expenses under items 6 and 7, in the sums of $2,200.00 and $2,200.00, in total, $4,400.00. The trips made in September–October, 1921, by Mims; in June, 1922, by Greenstreet, and in June, 1925, by Greenstreet and Mims; in order to establish the deterioration of the four engines, have also a bearing on facts for which Mexico should be held liable; but no indemnification is claimed on these counts.

Interest

32. The amount of $100,000.00 for which Mexico is responsible on account of the destruction of the three engines (paragraph 24) is a lump sum for injustice inflicted and should bear no interest. Nor should any of the other amounts, apart from what has been suggested at the end of paragraph 27.

Conclusion

33. In conclusion, taking account of what has been said in the foregoing paragraphs, it would seem proper to award the claimant the sum of $140,000.00, without interest.

DECISION

[Separate opinions by NIELSEN and MACGREGOR, Commissioners, omitted because of lack of space.]

All of the Commissioners are of the opinion that a pecuniary award should be rendered in favor of the claimant. Two of the Commissioners compute the damages to the claimant in the amount of $140,000.00. The other Commissioner computes the damages in the amount of $144,729.29. The sum of $140,000.00 must therefore be the award of the Commission. Two of the Commissioners are of the opinion that interest should not be included in the award, and interest must therefore be disallowed. The Commission accordingly decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of H. G. Venable, the sum of $140,000.00 (one hundred and forty thousand dollars) without interest.

Done at Washington, D. C., this 8th day of July, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

RUSSELL STROTHER *v.* MEXICO (Docket No. 3088)

Opinion rendered July 8, 1927

Award for illegal detention and cruel and inhuman treatment upon the same state of facts as in the claim of Harry Roberts (printed in this JOURNAL Vol. 21, 1927, page 357). During the imprisonment Strother escaped but was recaptured two days later. Mexico contended that the circumstances of the escape, involving an assault upon the guard and warden of the jail, should be taken into account in awarding damages. The United States replied that Strother, because of his escape, was subjected to worse treatment after reapprehension and was therefore entitled to greater damages. The Commission disregarded both contentions and made an award in the same amount as in the Roberts case ($8,000), without interest.

CHARLES S. STEPHENS AND BOWMAN STEPHENS *v.* MEXICO

(Docket No. 148)

Opinion rendered July 15, 1927

Mexico held liable for the reckless killing of an American citizen by a municipal guard without a uniform or insignia who, under conditions existing at the time, was held to be assimilated to a soldier acting in the presence and under the orders of a superior. Liability also found on the ground of denial of justice for failure to punish the guard or the officer who allowed him to escape.

Award made to brothers of the deceased in the nature of satisfaction for indignity and grief, although direct pecuniary damages are not proven or are too remote to form a basis for allowing damages in the nature of reparation (compensation).

Counsel: United States, Marshal Morgan, Assistant Agent; Mexico, Francisco A. Ursúa.

VAN VOLLENHOVEN, *Presiding Commissioner:*

1. This claim is put forward by the United States of America on behalf of Charles S. Stephens and Bowman Stephens, American nationals. Their brother, the American national Edward C. Stephens, a bachelor, was killed about 10 p. m., on March 9, 1924, by a shot fired by a member of some Mexican guards or auxiliary forces between Parral (Hidalgo del Parral), Chihuahua, and his residence, Veta Grande. Stephens was making the return trip from Parral, where he had passed the afternoon, travelling in a motor car in the company of two friends, a gentleman and a lady. At a point quite near the township of Villa Escobedo a shot was fired at the car, which killed Stephens instantly. The very young and very ignorant guard or soldier who caused his death, one Lorenzo Valenzuela, was arrested by the civil authorities, but handed over on March 11 or 12, 1924, to the military authorities at their request. On April 30, 1924, however, Colonel Hermógenes Ortega, when ordered to discharge the auxiliary forces (or guards) under his command, discharged also this military prisoner. Valenzuela after his escape never was apprehended. Ortega, who was responsible for the escape, was prosecuted, and was sentenced by the Judge of First Instance at Parral on January 12, 1926, to three years' imprisonment; but apparently was acquitted on appeal by the Supreme Court of Justice of the State of Chihuahua about February 9, 1926. The United States alleges that Mexico is liable for the unlawful killing by Valenzuela, and moreover for not protecting Stephens, not prosecuting Valenzuela, and not punishing Ortega, and claims an indemnity of $50,000.00 in favor of the deceased's two brothers, with interest thereon.

2. As to the nationality of the claim, which has been challenged, the Commission might refer to paragraph 3 of its opinion rendered in the case of William A. Parker (Docket No. 127) on March 31, 1926.[1] The nationality of the claim would seem convincingly established.

3. As to interests in the claim, the eldest brother of the deceased Stephens

[1] Printed in this JOURNAL, Vol. 21 (1927), p. 174.

suffered a remote pecuniary loss by his death, in that the deceased together with this brother supported an aged aunt living in a sanitarium, by contributing at first the sum of $75.00 a month, and later the sum of $65.00 a month, an amount which the eldest claimant alone paid after his brother's death. The youngest brother, who since 1924 appears to be suffering from melancholy or some mental disorder, would seem from the record not to have sustained any financial damage. When international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained and other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (Ralston, *Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American German Mixed Claims Commission in the *Vance* case (*Consolidated edition, 1925*, 528) seems not to take account of damages of this type sustained by a brother whose *material* losses were "too remote in legal contemplation to form the basis of an award" (the claim in the *Candlish* case was disallowed on entirely different grounds; *Consolidated edition, 1925*, 544). The same commission, however, in the *Vergne* case, awarded damages to a mother of a bachelor son (not to his half-brother and half-sister), though "the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meager and unsatisfactory" (*Consolidated edition, 1926*, at 653). It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of satisfaction, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation).

4. The State of Chihuahua, during the period within which the tragic event occurred, was one among the scenes of the revolution of Adolfo de la Huerta which lasted from November, 1923, to April, 1924 (see paragraph 11 of the Commission's opinion in the *Home Insurance Company* case, Docket No. 73).[2] Since nearly all of the federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called "defensas sociales"—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico or for its political subdivisions.

5. Valenzuela, that night, was on duty with two other men, under a sergeant. They were acting apparently under the "General ordinance for the army" of June 15, 1897, which was binding also on civilians living in Mexico, and Article 176 of which obligates all individuals who are halted by

[2] Printed in this JOURNAL, Vol. 21 (1927), p. 167.

sentries to answer and stop. When the four men saw Stephens' car come near, the sergeant ordered two of them to halt it, not adding that they should fire. Nevertheless Valenzuela fired, with fatal result. It is uncertain from the record, whether the soldiers first had called out to the occupants of the car, as under the ordinance of 1897 they should have done.

6. There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on this road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless. The guards should have realized that, even for foreigners aware of the conditions of the State of Chihuahua at that period, their wearing no uniforms rendered it difficult to recognize them as persons entitled to halt them, and that before indulging in stronger measures great care was indispensable because of their having the appearances of peasants, or even bandits. Being under the orders of a sergeant, the guards should have halted the car in accordance with his instructions, and Mexico contends that they were merely ordered to stop the automobile, without being ordered to fire at it. The excuse proffered by the killer that he merely intended to "intimidate" Stephens would seem too trite to deserve the Commission's attention; see paragraph 3 of the opinion in the *Swinney* case (Docket No. 130), paragraph 3 of the opinion in the *Roper* case (Docket 183), paragraph 1 of the opinion in the *Falcón* case (Docket No. 278), and paragraph 6 of the opinion in the *Teodoro García* case (Docket No. 292).[3] Bringing the facts to the tests expounded in paragraph 5 of the last cited opinion, there can be no doubt about the reckless character of the act. To hold this means a different thing from establishing that Valenzuela's act under Mexican law was punishable, a question which it is not for this Commission to decide; see paragraph 3 of the Commission's opinion in the *Teodoro García* case (Docket No. 292).

7. Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.

8. Apart from Mexico's direct liability for the reckless killing of an American by an armed man acting for Mexico, the United States alleges indirect responsibility of Mexico on the ground of denial of justice, since Valenzuela was allowed to escape and since the man who released him, Ortega, never was punished. Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to employ adequate measures to punish wrongdoers; compare paragraphs 18 and 25 of Commissioner Nielsen's opinion in the *Massey* case (Docket No. 352).[4]

[3] Printed in this JOURNAL, Vol. 21 (1927), pp. 562, 566, 581, 777.

[4] Printed in this JOURNAL, Vol. 21 (1927), p. 783.

9. Mexico has contended that this Commission, in any case submitted to it, can only take cognizance of facts which occurred before the filing of the memorial, and therefore should ignore the *second* court sentence, that of February, 1926, acquitting Ortega. Since, however, in the present claim the date of the memorial was December 17, 1925, and that of the *first* court sentence, which convicted Ortega, was January 12, 1926, it is immaterial whether Mexico's contention is right or wrong. If it is right, Ortega has been at liberty since the day on which he released Valenzuela (April 30, 1924) and never was convicted; if it is wrong, Ortega has been at liberty all that time and finally was acquitted.

10. Taking account of both Mexico's direct responsibility and its denial of justice, and of the loss sustained by the claimants as it was discussed in paragraph 3, an amount of $7,000.00, without interest, would seem to express best the personal damage caused the two claimants by delinquencies for which Mexico is liable.

NIELSEN, *Commissioner:*

I am of the opinion that there is legal liability on the part of Mexico in this case, and that a pecuniary award may properly be rendered in conformity with principles of law underlying awards made by the Commission in other cases. Peaceful American citizens were proceeding in an automobile in a locality where travel was neither forbidden nor restricted. I think that the record clearly shows that the killing of one of them, Edward C. Stephens, by a Mexican soldier, in the presence and under the command of an officer, was inexcusable; that the person who did the shooting was allowed to escape; and that the person who permitted the escape was not punished, although he was charged with the offense of permitting the escape of a prisoner.

FERNÁNDEZ MACGREGOR, *Commissioner:*

I concur in the opinion of the Presiding Commissioner.

DECISION

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Charles S. Stephens and Bowman Stephens, the sum of $7,000.00 (seven thousand dollars), without interest.

Done at Washington, D. C., this 15th day of July, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

United Dredging Company *v.* Mexico (Docket No. 483)

Opinion rendered July 15, 1927

Award of $33,625.76, with interest at six per cent, made on behalf of the claimant as compensation for services performed at the request of the Carranza revolutionary authorities at the port of Tampico in an attempt to salvage the Mexican gunboat *Veracruz*. No question was raised as to Mexico's responsibility for obligations incurred by General Carranza, or as to the performance of the services for which compensation was sought, or as to the propriety of the amount claimed; but Mexico questioned whether the services were rendered by the claimant company as contractor or as the agent of another contractor engaged in dredging and construction work in the port of Tampico. The Commission found nothing in the record to show that the latter contractor had any connection with the arrangement made between the claimant company and General Carranza.

Charles E. Tolerton *v.* Mexico (Docket No. 921)

Opinion rendered July 15, 1927

The Commission unanimously disallowed, for lack of sufficient proof, this claim in behalf of an American citizen who, as a member of a party of six Americans, was attacked on the afternoon of January 19, 1925, in the State of Sonora, Mexico, by a band of Yaqui Indians, and who asked reparation and satisfaction from Mexico in the sum of $50,000 on the grounds of lack of protection and failure to prosecute and punish the assailants.

F. R. West *v.* Mexico (Docket No. 241)

Opinion rendered July 21, 1927

Mexico held indirectly liable for the murder of an American citizen where the murderer was not captured and was later given the benefit of amnesty. The murder was an ordinary case of wanton killing and robbery devoid of any political background. There would seem no doubt but that granting an amnesty for crime has the same effect under international law as not punishing the crime, not executing the penalty or pardoning the offense.

Counsel: United States, Marshall Morgan, Assistant Agent; Mexico, Eduardo Suárez.

Van Vollenhoven, *Presiding Commissioner:*

1. Claim for damages in the amount of $25,000.00 is made in this case by the United States of America on behalf of F. R. West, an American national, on account of the murder of his son Edgar G. West, an American oil well driller, near Nanchital, Veracruz, Mexico, on December 2, 1922, by Mexican bandits who thereafter were granted amnesty by Mexico. The murder was an ordinary case of wanton killing and robbery void of any political background, West being a member of a party of some nine Americans, two Mexicans and one Chinese, who took the pay roll of their oil company (El Aguila, S. A.) from Puerto México, Veracruz, to Ixhuatlán, traveling first

by boat and thereafter by gasoline motor train. About 8.30 a. m. this train was fired upon from ambush by some fifteen bandits, who killed West, another American (a tool dresser by the name of Snapp), and the Mexican motorman, took the pay roll and the watch of one of the party, and disappeared. About 10.30 a. m. a Mexican officer with some one hundred soldiers arrived on the spot, but did not apprehend the culprits. On December 30, 1922, the Mexican Government issued an amnesty act, which—it is alleged—was interpreted by the Mexican President on August 21, 1923, so as to cover the murder of West and Snapp. The perpetrators, as far as the record shows, never were either prosecuted or punished.

2. The nationality of the claim, which was challenged, would seem to have been sufficiently proved under the principles asserted in paragraph 3 of the opinion in the *William A. Parker* case (Docket No. 127), rendered March 31, 1926.[1]

3. There would seem no doubt but that granting amnesty for a crime has the same effect, under international law, as not punishing such a crime, not executing the penalty, or pardoning the offense. If proven, it fastens upon Mexico an indirect liability. Article 1 of the decree of December 30, 1922, which is the pertinent provision here, reads (translated): "Amnesty is hereby granted to those guilty of rebellion and sedition and any act committed in connection therewith up to the date of the publication of the present act and beginning with the year 1920." On August 21, 1923, the undersecretary of the Mexican Home Office wrote to the El Aguila Company the following letter (translated):

FEDERAL EXECUTIVE POWER,
DEPARTMENT OF INTERIOR.

Despatch No. 3346. Number 7870.

Subject: That it is not possible to accede to the petition as stated in the enclosure herewith attached.

COMPAÑÍA DE PETRÓLEO "EL AGUILA," S. A.,

Avenida Juárez 92, 94, City.

In reply to your courteous memorial of the 4th instant, in which the aid of the President of the Republic is requested in order to prosecute the rebel leader Protacio Rosales and his followers, who were recently granted amnesty, for having been the authors of the attack committed December 2 of last year, upon the group of oil well drillers returning to their camps at Ixhuatlán, in which attack two Americans and one Mexican were killed, by advice of the First Magistrate, I have to state that the rebel Protacio Rosales and his followers having been granted amnesty by the War Department in accordance with what is ordered in the decree of December 30, last, for the crimes of rebellion and sedition and related crimes, and one of these latter being dealt with in the concrete case now denounced, it is not possible to accede to your request.

Universal suffrage. No reëlection.

THE UNDERSECRETARY:
(S.) VALENZUELA.

MEXICO, D. F., AUGUST 21, 1923.

[1] Printed in this JOURNAL, Vol. 21 (1927), p. 174.

When, on October 4, 1923, the oil company inquired of the Mexican Home Office, whether there had not been a misunderstanding in applying the amnesty act to the perpetrators of the crime of December 2, 1922, the chief clerk of the Division of Justice replied under date of October 11, 1923, that the company "should make application to the proper authorities as this Department has no power to institute any investigation concerning the aforementioned case."

4. It is not for this Commission to interpret the amnesty act; the only point of importance is how Mexico construed it. In this respect the letter of August 21, 1923, leaves no doubt. It states that it is written on behalf of the President himself; it establishes that it relates to the perpetrators, known or unknown, of the "concrete" crimes of December 2, 1922; and it contends that these crimes cannot be prosecuted because of the fact that they are within the scope of the amnesty act. The subsequent letter of October 11, 1923, fails to contain any statement to the contrary made on behalf of the President of the United Mexican States.

5. Mexico alleged that the letter of August 21, 1923, could not purport to interpret or construe the amnesty act, since the President and the Home Office were not authorized to construe it, but the judiciary only. It would seem that the first part of this contention is disproven by the text of the letter.

6. Mexico alleged that after receiving the second letter dated October 11, 1923, it would have been the duty of the oil company to have proceedings initiated in order to give the judiciary an opportunity to decide whether the amnesty act was applicable to West's murder. There is nothing in the amnesty act which suggests the existence of such a duty.

7. Since Mexico has issued an amnesty act and since the President of Mexico has held that it covered the murder of West, Mexico has granted amnesty to West's murderers, and has voluntarily deprived itself of the possibility of prosecuting and punishing them. The indirect liability which it thereby incurred would seem to be expressed best by awarding the claimant a sum of $10,000.00, without interest.

NIELSEN, *Commissioner:*

I concur in the conclusion of the Presiding Commissioner with regard to responsibility on the part of Mexico in this case. It is clear that proper steps were not taken to apprehend the murderers of West. Whatever may be the proper construction and application of the amnesty mentioned in the Presiding Commissioner's opinion, the reference to it in the record serves to furnish conclusive evidence with respect to the failure on the part of the Mexican authorities to take steps looking to the apprehension and punishment of those who attacked the party of which West was a member.

FERNÁNDEZ MACGREGOR, *Commissioner:*

I concur in the Presiding Commissioner's opinion.

DECISION

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of F. R. West, $10,000.00 (ten thousand dollars), without interest.

Done at Washington, D. C., this 21st day of July, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

T. J. SNAPP *v.* MEXICO (Docket No. 240)

Opinion rendered July 21, 1927

Award of $10,000 made upon the same state of facts as in the claim of F. R. West under the general principle of international law requiring authorities to take proper measure to apprehend and punish a person who appears to be guilty of a crime against an alien.

SALOMÉ LERMA VDA. DE GALVÁN *v.* MEXICO (Docket No. 752)

Opinion rendered July 21, 1927

The United States held liable for the failure of the State of Texas to bring to trial and punish an American citizen indicted for killing a Mexican citizen. The alleged inability of the State to produce a material witness is no justification for the failure to bring the accused to trial.

Counsel: Mexico, Eduardo Suárez; United States, Charles Kerr.

NIELSEN, *Commissioner:*

1. Claim is made in this case in the amount of 50,000 pesos, by the United Mexican States, in behalf of Salomé Lerma de Galván, mother of Adolfo Pedro Galván, a Mexican citizen, who was killed in August, 1921, at Driscoll, Texas, by an American citizen named Hugh K. Kondall. The facts in the case as disclosed by the record may be briefly summarized.

2. Kondall and Galván were employed as foreman and laborer, respectively, in the construction of a bridge at a point about a half mile north of the depot at Driscoll. On the morning of August 25, 1921, Galván had a slight altercation with the son of Kondall who supplied drinking water to the workmen. It appears that Kondall was angered when he learned of the episode and proceeded to his house where he probably procured a pistol. He thereupon returned to the place where Galvan was working. There is evidence that the latter, when he knew that Kondall was armed with a pistol, proceeded with a raised hammer in his hand toward the spot where Kondall and another man were standing, and that Kondall thereupon twice shot Galvan who died shortly thereafter.

3. Kondall was immediately taken into custody by the local authorities and charged with murder. On August 29, 1921, he was given a preliminary hearing before a justice of the peace at which several eye witnesses of the shooting were examined. The accused was required to give a bond in the amount of $25,000 for his appearance before the Criminal District Court of Nueces County, at its October, 1921, term. No indictment was returned against Kondall at that term of the court, but in the following March an indictment was found against him, charging him with the murder of Galván, and trial was set for April 20, 1922. Subsequently the accused was admitted to bail in the sum of $5,000.

4. Accompanying the American answer is a copy of the criminal court docket in this case from which the following is an extract:

> April 7, 1922. Case set for Thursday April 13, 1922, 10 A. M. Venire of fifty ordered for that date and hour. Writ returnable Tuesday.
> April 17, 1922. Case continued by agreement.
> December 14, 1922. Continued by operation of law.
> 4/30/23. Set for May 14. Special venire of 60 ordered.
> 5/14/23. Set for May 21.
> 5/22/23. Continued by agreement.
> 11/12/23. Set for 11/21.
> 6/5/24. Continued by operation of law.
> 5/8/25. Set for May 20. Venire of 50 men.
> 5/20/25. Continued illness of parties.

5. Additional evidence filed by the United States it is shown that the trial of Kondall was further continued at the instance of the State "because of a defaulting witness" and set for hearing at the term of court beginning on October 25, 1926, and still further continued at that term of court until April, 1927, on account of absence of material witnesses for the State.

6. The record contains an affidavit executed on November 24, 1925, by George C. Westervelt, District Attorney for the Counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, Texas. It is stated in this affidavit that several subpœnas were issued for the appearance at the several terms of court of Louis F. Johnston, an eye-witness to the shooting of Galván, and that the State could not safely and successfully go to trial without the production of this witness.

7. It is alleged in behalf of Mexico that there was an unnecessary delay in the prosecution of a person charged with a capital crime, and that under international law the United States should make compensation in satisfaction of a denial of justice. This case presents no difficulties. The question at issue is whether it reveals a failure of compliance with the general principle of international law requiring authorities to take proper measures to apprehend and punish a person who appears to be guilty of a crime against an alien. The Commission is bound to conclude that there was a clear failure on the part of the authorities of the State of Texas to act in conformity with this principle. There was no difficulty in the apprehension of Kondall, and a

preliminary trial was promptly held. At this trial testimony was given from which it seems to be obvious that a grand jury could not properly fail to return an indictment for murder against Kondall. An indictment was found by a grand jury in March, 1922. After that it is plain that the authorities failed to take the proper steps to try the accused. There is no satisfactory explanation of continuances of the proceedings from time to time. Justification for the failure to bring the accused to justice cannot be found on the ground stated in the affidavit made by the District Attorney as late as November 24, 1925, that a certain eye-witness had not been located. There is no reason to suppose that the legal machinery of the State of Texas is so defective that in a case in which a preliminary trial reveals that there were at least five eye-witnesses to the shooting of Galván the authorities during a period of six years after the shooting found themselves unable to conduct a proper prosecution. If any such defect had existed it would not be an adequate defence to the claim presented by Mexico. If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay. If may be observed that the argument in behalf of the United States appeared to be directed more to the question of the measure of damages than to a justification of the delay in the proceedings against the accused.

8. I am of the opinion that in the light of the principles underlying decisions rendered by the Commission in the past an award may properly be made in this case in the sum of $10,000.

VAN VOLLENHOVEN, *Presiding Commissioner:*
I concur in Commissioner Nielsen's opinion.

FERNÁNDEZ MACGREGOR, *Commissioner:*
I concur in Commissioner Nielsen's opinion.

DECISION

The Commission decides that the Government of the United States of America shall pay to the Government of the United Mexican States in behalf of Salomé Lerma de Galván the sum of $10,000 (ten thousand dollars) without interest.

Done at Washington, D. C., this 21st day of July, 1927.

C. VAN VOLLENHOVEN,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

BOOK REVIEWS*

National Frontiers in Relation to International Law. By Vittorio Adami, translated by T. T. Behrens. London: Oxford University Press (Humphrey Milford), 1927. pp. viii, 127. Index. $3.50.

This treatise does not include a word regarding the boundary settlements in Europe since 1919. No one could assume, however, that the delimitation of the several European boundaries during the last decade has contributed nothing to international law. It appears, therefore, that the author and the editor of this work should have explained their basis for omitting discussion of the vast and enlightening experience of recent years. The author of the work is a colonel in the Italian army, attached to the historical section of the general staff; the editor and translator is a lieutenant colonel of British Royal Engineers and was a member of the Italo-Austrian boundary commission. Surely these gentlemen are familiar with the problems of boundary marking which have lately arisen.

The book has eleven chapters, dealing with frontiers in general, mountain boundaries, river boundaries, boundaries on lakes, sea boundaries, artificial and conventional boundaries, aërial boundaries, boundary marks, delimitation documents, boundary disputes, and boundary magistracies. These are the work of Colonel Adami. An appendix by Colonel Behrens discusses difficulties in marking boundaries upon watersheds. There is a bibliography of five pages and a conveniently detailed index.

Historically the book appears to stand by itself as an exceedingly useful account of the legal basis of boundary marking in Italy and southern Europe. It occasionally goes to other parts of the world for illustrative material, though it is far from exhaustive. In discussing conventional boundaries based upon geographical coördinates, for example, Adami refers to such boundaries in Africa but says nothing about the northern boundary of the United States west of the Lake of the Woods or the eastern boundary of Alaska north of Mt. St. Elias.

LAWRENCE MARTIN.

From Bismarck to the World War. A History of German Foreign Policy, 1870–1914. By Erich Brandenburg. Translated by Annie Elizabeth Adams. London: Oxford University Press (Humphrey Milford), 1927. pp. xiii, 542.

The World Policy of Germany, 1890–1912. By Otto Hammann. Translated by Maude A. Huttman. London: George Allen & Unwin, Ltd., 1927. pp. 269.

In the translation of these two books a signal service has been rendered to English and American readers wishing to keep abreast of recent studies of

*The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—ED.

European diplomacy during the quarter-century preceding the World War. Of Brandenburg's work, G. P. Gooch justly remarks in his *Recent Revelations of European Diplomacy* (p. 21): "No other country possesses such a masterly delineation of its foreign policy during the last generation of peace." Its general character and conclusions were commented upon in a review of the first German edition in this JOURNAL for July, 1925 (pp. 651–652). Admirably objective in narrative analysis and criticism, its principal limitation lies in the fact—to which is also due its solidity within its own scope—that it is based almost exclusively on the documents of the German Foreign Office. The translation, adequate though far from faultless, is from a second German edition in which the footnote references are now made to those documents as published down through Vol. XXI of the *Grosse Politik*. References have been inserted to a few other books issued since the first edition, but only rare changes in the text have been made in consequence of the appearance of new material. Most noteworthy are those occasioned by Jäckh's *Kiderlen-Wächter*, resulting in fuller and more severe criticism of that statesman's policy (pp. 360, 376–378), and by Stieve's *Iswolski und der Weltkrieg*, leading to sharper judgments against the conduct of Russia and France in connection with the Balkan Wars (pp. 419, 455–456). Lord Grey's *Twenty-five Years* is dealt with in an appendix, reaching the conclusion: "All his utterances show that the historical work of the last few years has left him untouched and that he still moves entirely within those modes of thought which were produced by war-hypnotism."

Hammann's book, which owes its special interest and value to the personal touch of a writer who himself served in the Foreign Office during the period under consideration, arrives by shorter cuts in narrative at much the same judgments on the directors of German foreign policy and their work—that, without the least will to war, they bungled their opportunities to secure the peaceable development of their country's relations with its neighbors, especially England, and led it fatally into the trap prepared by its enemies.

J. V. FULLER.

La nuova legislazione Russa e la condizione degli stranieri. By Enrico Catellani. Venice: Premiate Officine Grafiche Carlo Ferrari, 1927. pp. 114.

Professor Catellani has in this interesting paper defined his subject as "the condition of foreigners under the new Russian Legislation." His plan leads him to make a rapid survey of certain aspects of the Russian legislation since the Revolution. This survey, within the space available, is necessarily superficial, and critical comment on details is not the object. In some subjects, such as marriage, divorce and even succession, it would not be hard to maintain that Russian legislation has only carried to a more logical and uncompromising conclusion tendencies familiar elsewhere. The author's main thesis, however, is that the peculiar nature of the Russian

Revolution and of the new system introduced under it produce very special problems in reference to the rights and status of foreigners, and in fact make it difficult to reinstate and maintain the ordinary juridical relations between Russia and the other European nations.

The Russian movement was in its essential conception founded on a basis broader than nationalism. This conception extended beyond the national boundaries to the manual workers of the world, hence in theory at least the foreigner belonging to the favored class was to share on an equal basis the rights and privileges of the native worker. This is the grandiose and idealistic side of the matter vastly outweighed in practical effect by the virtual proscription of all other classes of society. In the end the foreign worker may be generally on an equality with the native. The rights of other foreigners depend mainly on treaty provisions with the country of their nationality.

Professor Catellani takes occasion to summarize the contents of the principal treaties projected or actually entered into by Russia with other nations, particularly the proposed British treaty which was never consummated, and the Italian and German treaties. In all negotiations looking to the establishment of permanent relations, the Russian economical system created special problems, particularly that of prescribing equivalence of rights and privileges between the subjects of nations, one of which has completely suppressed a whole class of property and personal rights which are normal in the other.

After a rapid but interesting review of various aspects of the new legislation, Professor Catellani reaches his fundamental thesis in the discussion of the execution of foreign judgments and the limitations imposed by considerations of public policy. These subjects enter largely into the ordinary relations of friendly states and their consideration from a practical point of view emphasizes the difference between the Russian system and that of other nations. The fundamental difficulty in the mutual enforcement of justice is that the conception of justice itself is materially different. Equality before the law has long been a commonplace in every civilized country, not always attained in fact, but consecrated in theory and intention. But we are told that in the very organization of the Russian courts the interests of the workers are specially recommended to the care and protection of the judge. In its particular place this can only mean that a class is to be systematically favored. A class justice is imposed with class judges to enforce it, who have no legal tradition behind them. This situation renders the mutual enforcement of territorial judgments practically impossible. Finally, the radical differences in the conception of "public policy" between a country which is founded on the recognition of rights of property and personal liberty, and a country where both are reduced to a minimum, leaves little room for coöperation in the enforcement of justice.

For the present, therefore, the barriers which prevent Russia from

participating in the community of European states are apparently insurmountable so far as approach is sought in normal legal and judicial relations. Gradual adaptation and modification must be expected, and the author finds some promise in this direction in the organization of the Confederation of Soviet Republics, and perhaps more promise in the lessons which may be drawn from past history and particularly from the gradual return of Revolutionary France to the community of nations.

JAMES BARCLAY.

Ten Years of War and Peace. By Archibald Cary Coolidge. Cambridge: Harvard University Press, 1927. pp. 268. Index. $3.00.

A melancholy interest attaches to this volume, writing the word *finis* into the short but significant list of books bearing the name of Archibald Cary Coolidge. Written during the years of his editorship of *Foreign Affairs* and covering the same world-wide field as the great review of which he was the moving spirit, *Ten Years of War and Peace* reveals the broad sweep of its author's interests. To the judgment of a man of the world, a traveled scholar and an observer who mingled a certain cosmopolitan sophistication with the laboratory work of the teacher of history and foreign relations, Professor Coolidge occupied a unique place among his colleagues. His contacts with diplomats and men actually engaged in world affairs gave him a breadth of view too often lacking in American treatises of this nature. Our foreign policy has suffered from a lack of such constructive criticism. Professor Coolidge's equipment for his task, a less unusual one in Europe, is generally lacking on this side of the Atlantic.

As the title indicates, these essays deal chiefly with the diplomatic history of the decade following the significant date, 1917, when the United States first undertook the rôle of a militant world power. It is a commentary upon the swift tempo of the diplomatic movements of the last ten years that so many of the matters treated are already outdated by subsequent occurrences. Although sometimes ephemeral, there is nothing journalistic about these closely reasoned and constructive studies. In a short, apologetic preface the author confesses to have yielded to the temptation of reprinting outworn material. While courageously prepared "to accept criticism for opinions or predictions which have since proved to be mistaken," he does not abandon the principles that underlie his conclusions. It is in the spirit of this disarming formula that these reviews of foreign politics must be approached by the reader.

The inclusion of such subjects as the chapters entitled, "After the Election," which bears the date of December 15, 1924, and "Dissatisfied Germany," reprinted from an article written in October of the following year, are interesting, at best, as documents of their time. In the light of recent events, the chapter entitled "The Future of the Monroe Doctrine," and a

more recent study under the title "The Grouping of the Nations," written in January, 1927, are more significant. It was Professor Coolidge's thesis that "there are no such theoretical differences between our 'system' and that of Europe, as there were when President Monroe wrote about them." He seems to lay upon factional and party differences the burden of America's refusal to depart from the old conception of isolation, once based upon Monroe's declaration that "in the wars of the European powers . . . we have never taken part." In the pages devoted to the important readjustments of the Monroe Doctrine that coincided with its centenary in 1923, the author notes the significance of Ambassador Fletcher's speeches at the Fifth Pan American Conference at Santiago, where he "flatly proclaimed that it was a unilateral expression of our individual policy." An even more authoritative statement, was that of Secretary Hughes in his speech of August 30, 1923, when he declared that the Monroe Doctrine is "distinctively the policy of the United States," and that "the Government of the United States reserves to itself its definition, interpretation and application." The broad implications of this "Centenary Doctrine," debated by the League of Nations but a few months ago, did not, of course, escape the attention of Professor Coolidge in March, 1924.

The recent Havana Conference has revealed the hollowness of much that has been written regarding "Pan Latin-Americanism" and "Pan Iberianism." Such European critics as Mr. Gauvain of the Paris *Temps*, in stressing geographical and cultural factors, overlooked the importance of the economic, as well as the historical, phases of Pan Americanism. Yet the following question pondered by Professor Coolidge deserves serious attention: "Why should the circumstance that the United States and Argentina happen to be connected by land . . . outweigh the fact that Buenos Aires is about as near to London, Paris, Berlin and Rome?" Continuing the same thesis in a more recent article entitled "The Grouping of the Nations," Professor Coolidge studies the underlying reasons, economic and linguistic, which have given rise to similar regional theories in Europe, such as the Pan Anglo-Saxon, Pan Germanic and Pan Slavic movements. The proper basis, he maintains, for the grouping of nations is geographical and, however contrary such a conclusion may be to popular political doctrine based upon historical and national affinities, he argues that a "Pan-Europe would be no more incompatible with the general association of nations than is the existence of individual states today." The author's forebodings regarding the "isolation" which might overtake the United States should political evolution follow these lines is, however, modified by a hypothesis that a "Pan-Europe" may not include the British Isles. He notes that "never perhaps stronger than at the present day," is the feeling in certain quarters that "England should keep away from continental affairs." If, as this school maintains with some reasonableness "her interests lie in the development of her splendid territories and with closer relation to her offspring beyond the

seas, including those in the United States," Great Britain's "Empire" must frankly become a far different political union than at the present day.

Through the entire series of these studies, written at different times and in varying circumstances, there runs a unifying thread: that political formulas which have "outlived their time" must be capable of "transformation and new life." This last wise message remains in mind as the reader closes the pages of *Ten Years of War and Peace.*

W. P. CRESSON.

Political Philosophy from Plato to Bentham. By Dr. Géza Engelmann. Translated by Karl F. Geiser, Ph.D. With Introductions by Oscar Jászi, Ph.D. New York: Harper and Brothers, 1927. pp. xxiv, 398. Index. $3.00.

The original work, entitled *Meisterwerke der Staatsphilosophie,* was published by De Gruyter & Co., of Berlin and Leipzig in 1923. It is a slender volume of 257 pages with a brief paragraph of preface. It is written without comment or annotation. At the end is a table giving the names and dates of the writers selected, with the name of the book chosen for exposition. The preface to the English translation states that Dr. Engelmann has planned three more books: one, dealing with writers on the law of nature, including Bodin and Grotius; another devoted to Oriental political philosophy; and a final volume on the political thinkers of the last century.

The author, a prominent Budapest jurist of liberal opinions, has, in working over a well-tilled field, produced a study which can only be called unique. The book is neither a history nor a digest of political philosophy. It is rather a restatement in the terms of modern thought of those leading political ideas which have recurred in every age. In his foreword, a translation of which appears in the preface to the English work, the author observes that he has considered it his "duty" to "record every thought that seemed valuable for the present" (*jeden Gedanken, der für die Gegenwart wertvoll erschien*). This brief statement defines the scope of the work. This point of view, with its sense of obligation, has such a profound effect on the subject matter, that failure to appreciate it must result in a fatal misapplication of the book. In the English version, the lengthy preface and the introduction to each writer taken up make a notable contribution to the author's thought by clarifying and vitalizing the material presented, and by thus remedying what seems to this reviewer to be a defect in the original. In pursuing his object, Dr. Engelmann has selected only those ideas which present analogies to contemporary political thought. That is why his work is not a history. In his exposition of his subjects, he has written as if each of his philosophers were himself explaining his ideas. That is why the book is not a digest. It is perhaps a mixture of both—essentially a summary, yet only of certain topics; a curiously attractive presentation, with its air of simple personality.

Its very tissue is alive and direct. Archaisms and obsolete terminology have been replaced by their modern equivalents, or have been quietly dropped without the ceremony of burial. The book makes fascinating reading.

The *Meisterwerke* is a mute demonstration of the fact that there is a body of conflicting and self-perpetuating ideals which are common to political man. It is, also, more than this. Stripped of the technique and the trappings of their contemporary civilizations, the thought of the great philosophers exposes the hardy endurance of the problems which are so frequently considered to be peculiar to the world of the twentieth century. Yet this is not all. One lays down this book struck by the essential similarity of the solutions which have been brought to bear upon these problems; and this, in the light of the failure of man to solve even the most pressing of his difficulties, can only be called pathetic. Dr. Engelmann has ably discharged his triform duty. The editors have made his purpose their own, but they have announced it with trumpets and with the hot conviction of the crusader. The preface, which, it should be noted, forms an integral part of the English version, is a brilliant attack on the "haughty relativism" and opportunist materialism (p. xv) of current political thought with its reliance upon "very mediocre, ill-conceived and eclectic modern theories" (p. xxi). The *Meisterwerke* is no longer mute.

The various introductions by Dr. Jászi, keenly analytical, have the strange effect of telescoping the past and the present. They are always stimulating and frequently provocative. He regards Dante, for example (p. 105), as, perhaps, "the first conscious consequent (consequential?) pacifistic thinker of the world," and regards his chief merit as being the recognition that without the organization of a world superstate possessing sovereignty, "the idea of peace will remain Utopian." It is true that Dante wanted unity for the sake of peace. Yet a modern man may question the quality of a peace that is imposed from without.

Since the author's method of exposition lies at the heart of his study, a translation has presented subtle difficulties. Dr. Geiser, however, has done this work expertly. The significant charm of the original has been preserved in fluent English. This book should be studied by every teacher of politics and thoughtful man of affairs.

A word as to the apparatus. Dr. Engelmann has selected for exposition Plato, Aristotle, Aquinas, Dante, Machiavelli, More, Hobbes, Spinoza, Locke, Montesquieu, Rousseau, the joint authors of the *Federalist*, and Bentham. One regrets, without finding fault, the omission of some of their peers—Marsiglio of Padua, Calvin, Luther, the author of the *Vindiciae contra Tyrannos*. The omission of Bodin seems open to objection because his doctrine of sovereignty, and not that of the law of nature, is usually considered his greatest contribution to political thought. The inclusion of Sir Thomas More is justified—at least to this reviewer—because he was a member of Parliament and a Lord Chancellor who wrote a plan for a communistic

state. The appearance of Hamilton, Madison and Jay is an innovation which will meet with general approval.

PERCY THOMAS FENN, JR.

Parliament and War. The Relation of the British Parliament to the Administration of Foreign Policy in Connection with the Initiation of War. By Francis Rosebro Flournoy, A.M., Ph.D. London: P. S. King & Son, Ltd., 1927. pp. xi, 282. Index. 15 shillings.

This monograph is the first of a number of studies which the author has undertaken for the investigation of a proposal that the British Parliament be given a wider range of activity in the management of foreign relations. It has been said that popular control of foreign policy should be increased, secret diplomacy prevented, and efficiency promoted by giving a Foreign Secretary the "stronger position" which would result if it were known abroad that his policy had the express approval of his Parliament. The author mentions these claims of advantage not to discuss their validity but "merely to show that there is here an important problem of political science which deserves careful examination." He proposes to make available for such an examination a body of fact relative to the actual working of the system in the past; that is, information with regard to the part which Parliament has played heretofore in directing foreign policy.

The present volume deals historically with the share which Parliament has had since the reform of the House of Commons in 1832 in the decision of questions which have led to war. It is to be followed in the near future by a study of the influence of Parliament in guiding foreign policy during crises involving danger of war but not actually resulting in hostilities, and by another on the relation of Parliament to the treaty-making power.

The author avoids the danger of exaggerating the check which the House of Commons may exert upon the Cabinet and points out the difficulty of an attempt to force a resignation on a matter of foreign policy. Parliament frequently lacks adequate and accurate information with regard to foreign problems because much that is vital is revealed only at the discretion of the executive officials, who may reply to a question in Parliament that the information sought is confidential and cannot be given without injury to the public interests. Yet Parliamentary opinion has a very considerable effect.

To discover how much influence Parliament has actually had in dealing with problems which have led to hostilities, the author reviews the foreign policies and the debates on them in the period immediately preceding the outbreak of all the important wars and some of the minor ones in which England has been engaged since the Reform Act of 1832. There are separate chapters on the first Afghan War of 1838; the "Opium War" with China; the Crimean War; the China War of 1856–1860; the war with Persia, 1856–1857; the Abyssinian War of 1867–1868; the Afghan War of 1878–1880; the occupation of Egypt in 1882; the Boer War of 1899–1902, and the World

War. The study brings out interesting facts. While some British statesmen have held that some consultation with Parliament on the question of making war is required by the British constitution, no declaration by Parliament is necessary, and "there appears to be no case in which a Government has given any pledge that it would consult Parliament before committing the country to war."

While Parliament has had some influence in directing the course of the Cabinet in dealing with foreign problems, it has attempted little control. The creating of a committee on foreign affairs has been proposed, but only for the purpose of affording the Foreign Secretary opportunities of giving such information on questions of foreign policy to members as would enable the House to exercise closer supervision over the conduct of foreign affairs.

The author of this volume has accomplished his purpose. He has brought together a body of fact, well arranged and stated with fairness, which will be valuable in the study of the question of popular or legislative control of foreign policy.

H. W. TEMPLE.

Les Gouvernements de Fait devant le Juge. By M. Noël-Henry. Preface by M. J. Basdevant. Paris: R. Guillon, 1927. pp. xxxii, 260. Fr. 60.

Mr. Noël-Henry, French consul at Geneva, is one of the outstanding authorities on international law. His recent book *Le Gouvernement de Fait devant le Juge* treats of one of the most talked of questions of the day in an attractive and practical manner. The author points out, first, that the distinction between a *de facto* government and a *de jure* government is a purely subjective one, which does not conform to the positivism of international law. International law recognizes only two forms of government, namely, the insurrectional kind resulting from a revolution, and the regular kind to which power has been normally transmitted.

The rights and prerogatives of a *de facto* government are, in this book, the subject of a comparison with the rights of a *de jure* government. A complete study of the consequences arising from the recognition of a government by a foreign country is also made. Mr. Henry does not follow the method of development which consists mainly of a theoretical discussion of the question, from an academic or diplomatic point of view. He is much more concerned with a logical presentation and discussion of the numerous decisions rendered on the subject of *de facto* government by many courts in the principal countries of the world during the past few years, and lays special stress upon the decisions of French and American judges.

The book is divided into three sections. The first part is presented and discussed from the point of view of the *Juge interne*. This means judges who have to pass upon the acts of a former government of their own country, which government was destroyed by a revolution or pronunciamento. The second chapter deals with the point of view of the *Juge tiers*, that is, the

judge who has to examine the capacity of the government of another country and the extent to which the same may influence the conduct of his own government. In the third part is discussed the point of view of the *Juge international*, or the decisions rendered by courts which have to decide whether the recognition of an insurrectional government has been granted justly or unjustly, and to render judgments accordingly. This happens when a judge has to settle a dispute between foreigners, one, or all of whom, being subjects of a *de facto* government. It is clear that the problems presented to the *Juge interne*, the *Juge tiers* and the *Juge international* are quite different, and that it is a mistake for one of these judges to allow himself to be influenced by the jurisprudence of the other. The author believes that this error has been committed in the United States and gives examples tending to prove that matters arising, for instance out of the formation of the Soviet Government, have been judged from the wrong point of view. The author concludes:

1. That the theory of *de facto* government belongs to constitutional law and must not be confounded with the theory of the recognition of states, which is one of public international law.

2. That the state is, where its internal affairs are concerned, absolutely autonomous. From this results the principle of non-intervention, and the principle that with regard to its extraterritorial affairs a state must submit itself to the rules of international law, and is responsible for its extraterritorial acts.

3. That the judge, who should have a large discretionary power in internal affairs, must carefully subordinate his judgment to that of his government when the interests of other states, or of their subjects, are at stake. Also it is advisable that judges as a rule should refuse jurisdiction when they have to pass on controversies to which foreign governments are parties. Only to a limited extent should judges have recourse to the principles of international law, in order to censure the acts of their own governments or of foreign governments. However, it is necessary to have a judge of sufficient knowledge, integrity and prestige, independent of governments and free to criticize such governments according to the principles of the jus gentium.

R. BERTEAULT.

Current International Coöperation. By Manley O. Hudson. Calcutta University Readership Lectures, 1927. Calcutta: University Press, 1927 pp. 149.

This little book contains four lectures delivered by Professor Hudson at the University of Calcutta in January, 1927. The first one entitled "The Growth of International Coöperation before the War," surveys the transformation of the world from an aggregation of more or less isolated states to an international community and traces the development of agencies of conference and coöperation to serve the common interests of mankind. In

the second lecture entitled "The Rôle of the League of Nations in World Society," the author discusses the nature of the League, which he emphasizes as being less a new political entity like a state than an agency or method of co-operation by the individual states which are members of it. In the same lecture he reviews the more important achievements of the League in the interest of the common good and especially for the advancement of the peace of the world. He emphasizes the point that the League itself has no policy on international questions. The facility with which conferences can now be assembled, he rightly regards as one of the most important advantages which the establishment of the League has brought about. On the whole, the achievements of the League so far justify the belief that it has a very promising future. In the third lecture, entitled "The Rôle of International Courts in World Society," Professor Hudson discusses, of necessity very briefly, the Permanent Court of Arbitration, the abortive International Prize Court, the regretted Central American Court of International Justice, the proposed International Criminal Court, and the Permanent Court of International Justice. He believes that, with all its defects, there is still a place for the old Court of Arbitration and that some states will still prefer it to the new court. He is inclined to think that the advantage of giving the court compulsory jurisdiction has been over-emphasized; he defends the principle of advisory opinions; and finds no cause for worry over the lack of sanctions to insure the enforcement of the judgments of the court.

In the fourth and final lecture entitled "The Current Development of International Law," Professor Hudson surveys rapidly the recent progress of positive international law which, thanks to the development of the conference method of legislation, has been very great, especially since the World War. The conclusion of more than 1300 treaties since the war, many of them multilateral conventions, is evidence of the rapid progress which is being made in the development of conventional law.

Each lecture is accompanied by a brief select bibliography of the literature of the subject with which the lecture deals. Altogether the record of the development of international coöperation as it is summarized by the author is full of encouragement for the future.

J. W. GARNER.

L'Islam et L'Asie devant L'Imperialisme. By Eugène Jung. Paris: Marpon et Cie., 1927. pp. 314. Fr. 15.

Less than two years ago the author of this volume published a book entitled *L'Islam Sous le Joug*, in which he sought to depict the restlessness of the Islamic nations around the Mediterranean basin, as well as throughout Asia generally; it is claimed that this present book is its sequel. The volume seeks to portray an accurate description of the feelings and views of the Islamic peoples around the Mediterranean, the Near East, and the extreme Orient, suggesting that these sentiments are aroused in each area

by the similarity of treatment extended to the various areas and races concerned by the Western Powers. This treatment appears to be Western indifference to the Islam religious faith, coupled with an equal indifference to Asiatic aspirations as regards local government, maintenance of territorial areas and boundaries and the desired freedom to govern, as the inhabitants of each area desire. Into this general indictment the author injects a sense of alarm that the League of Nations and the Treaty of Versailles, by its mandate system, may provoke the Asiatic people to reprisals. Hence he sets out with constructive skill the case of each area, among which he mentions in some detail those of Syria, Lebanon, Turkey, Yemen, Persia, Mesopotamia, and Far Eastern countries, giving, with each section, extracts from documents or letters, some of which have been presented to the League of Nations, to support his contentions. (pp. 51, 58, 61–65, etc.)

One is glad to note, in passing, that the author has given references in some cases. But the practice of quoting letters of correspondents without giving names and dates is entirely valueless as a contribution to human knowledge as it is reprehensible in scholastic writing. (Vide p. 6.) Long ago Edmund Burke said it was impossible to draw an indictment against a nation. So much the more impossible is it to draw one against the League of Nations. Every form of government, every form of concert of governments, when in executive work will make mistakes; as the human individual makes errors, so will committees of human beings. No good is achieved in railing against the age in which we live or against its difficulties. From these two aspects the book is of little value. But from that of collecting documents, newspaper cuttings and personal opinions of publicists, it has value.

Though one-third of the volume is devoted to Syria and the Lebanon and their difficulties under French control, it is surprising to find that the author is unaware of the commercial and trade progress made under the French mandate. Imports have risen by over 300 millions of francs and exports by over one hundred millions, while the road mileage has more than doubled and the railway mileage is kept at a high state of equipment and repair. (pp. 67 to 170.) The same condition is found in the British mandate of Palestine; while the Chinese state of affairs, due to the revolution, is by no means rendered worse by the suggested injuries done to the Islamic faith due to Western indifference. The proper plan is to compare these areas and their trade in pre-war days with the condition today. If the condition in 1927 is really worse than 1900 to 1914, after due examination, then the author has a case. But viewing the world as a whole, no one but a pessimist can assert that the conditions are worse, or less economically sound today than in the early post-war days. The author also makes no reference to the fact that, even under what he considers unpleasing conditions, the Sunnis show no desire to amend their perpetual quarrel with the Shee'ars, and until this is so, any Islamic revolt bids fair to remain local.

B. CARPENTER.

Shanghai: Its Mixed Court and Council. By A. M. Kotenev. Shanghai: North-China Daily News & Herald, Ltd., 1925. pp. xxvi, 588. Index. Mex. $20.

As indicated by the author, this work is based on information supplied by former British and American assessors of the International Mixed Court and by active officials of that court. The first part deals with the history of the Municipal Council of Shanghai from 1842 to 1923 and with the history of the Mixed Court from 1864 to 1924. Some statistical tables of criminal and civil cases that have come before the court are given in the appendix to Part I. The historical portion is supported by numerous footnotes giving references to official correspondence relating to the court.

The reviewer's opinion, based on his own previous experience as an assessor of this court is that, to entitle it properly to be termed a "court," entire independence of the foreign assessors from the influence and control of their respective consulates, and of the Chinese magistrates from their local officials, is necessary. As it is, the so-called "court" more frequently plays the part of a mediator or an arbitral tribunal inclined to compromise and to be influenced by political or national considerations rather than functioning as a court of justice deciding cases strictly according to law.

The second part of the first volume contains the text of the Rules of Procedure of the Mixed Court, and the "Provisional Criminal Code of the Republic of China," which is supposed to govern the court in criminal cases. However, "custom," and the mutual agreement between foreign assessors and Chinese magistrates more often govern the sentence than the provisions of the code. The Chinese Supreme Court Decisions are interesting as being perhaps the first compilation undertaken in English; but their value as precedents may be questioned. The Chinese Regulations relating to Commerce, Copyright and the Land Regulations and By-Laws of the Foreign Settlement are valuable for reference purposes.

The author has in this volume done a valuable piece of work and has supplied under one cover for the first time material of great importance to government officials having to deal with Chinese affairs, and also a valuable source book for teachers of courses on the Far East.

CRAWFORD M. BISHOP.

Shanghai: Its Municipality and the Chinese (A.D. 1843–1927). By A. M. Kotenev. Shanghai: North-China Daily News & Herald, Ltd., 1927. pp. xvii, 548. Index. Mex. $15.

This book forms practically the second volume of *Shanghai: Its Mixed Court and Council.* Part I deals with the politics of China from 1919 to 1924 and with the questions of the relation of the municipality to the Chinese in such matters as settlement extension and roads, Chinese representation on the council, child labor, and legislation concerning the press. Part II

takes up the opium problem at Shanghai and the opium policy of the council from 1906 to 1926, and the relation of the Mixed Court to the opium question from 1864 to 1926. Part III deals with recent laws and regulations of the Chinese Republic. It contains the Constitution of the Republic as proclaimed on October 10, 1923 (translated and published by the Commission on Extraterritoriality, Peking). The inauguration and constitution of the Shanghai Provisional Court (former Mixed Court) and the Rules of Procedure, 1927, are set forth, together with various other special regulations relating thereto. Considerable statistical matter relating to industrial and social conditions in the settlement is also included.

This volume, like its predecessor, is primarily intended as a handbook for legal practitioners and business men residing in Shanghai; but it will also be found useful as a book of reference for teachers and students of Chinese history, trade and diplomacy. The author has, as he states in his preface, confined himself to a study of facts, without attempting to discuss or pass judgment upon the policy pursued by the various foreign and Chinese bodies in adjusting problems of administration. The work presents valuable source material for a study in municipal administration.

The reader will of course bear in mind that Chinese laws and regulations are more honored in the breach than in the observance. The assistance extended the author in this, as in the preceding work, by former foreign officials of the Mixed Court gives assurance, however, as to the reliability of data furnished.

CRAWFORD M. BISHOP.

Der Kampf der Deutschen Liga für Menschenrechte, vormals Bund Neues Vaterland für den Weltfrieden, 1914–1927. By Otto Lehmann-Russbüldt. Berlin: Hensel & Co., 1927. pp. 192. Index. Rm. 4.50.

There has been in recent years a flood of literature concerning the origin of and responsibility for the World War. Comparatively little has been written of efforts made in belligerent countries for shortening the war. This book holds special interest, for it recounts the history and activities of the *Bund Neues Vaterland*, a German organization for peace. The reader is made acquainted with the phases of the German peace movement in chronological order: the organization of the *Bund* shortly after the outbreak of the war; its participation at the Hague conference for peace in April, 1915, convoked by the *Anti-Oorlog-Raad* of the Netherlands; the fight conducted against annexation aspirations within Germany; and the activity of the organization after the war, aiming at a better understanding with other nations (particularly France, Poland and Russia), and at the pacification of Germany itself.

The book is not the product of the austere impartiality of the historian; it is largely a narrative of the personal experiences and opinions of the author, a well-known German pacifist, supplemented by references to the

opinions of other men, most of whom were his collaborators in the *Bund*. From a scholarly point of view, the publication of confidential correspondence and circular-letters is valuable. Students of the history of the World War will find special interest in the report of the Hague conference where enemy subjects came together at the green table for the first time after the outbreak of the war. The author seems to assert that there was then a willingness on the part of England to enter into negotiations for the conclusion of the war, and that such negotiations could have been brought about through the intermediary of Dr. Dresselhuys, who presided over the Hague conference, had the German Government not taken an irreconcilable attitude.

The book is a strong condemnation of the policy of Imperial Germany, although little compliment is paid to the conduct of affairs in present Germany. The author seems not altogether unprejudiced: the work done by the *Bund* is unduly stressed, and too little credit is given to the aims and good will of other Germans.

FRANCIS DEÁK.

Un livre noir. Diplomatie d'avant-guerre et de guerre d'après les documents des archives russes (1910–1917). Préface de René Marchand. Tome troisième, Août 1914–avril 1915. Paris: Librairie du Travail, 1927. pp. xix, 137. Fr. 12.

The Soviets and their sympathizers have contributed more to historical records in this little volume than in the previous revelations of diplomatic letters which they have made public. Again, it is Izvolski whose files are printed, but the large amount of purely personal gossip and third-rate speculation, which so intrigued the publishers in the earlier instalments, is here lacking. The 165 pieces in the volume are dated between August 5, 1914, and April 21, 1915, and are almost wholly devoted to the political side of the war, the inevitable negotiations to line up such countries as Italy, Rumania, Greece and Bulgaria, and the tentative efforts at early agreement on the eventual terms of peace.

This third volume of *Un livre noir* is a small one because "experience has shown us that too-large volumes, by the multiplicity of questions dealt with, are of little value to workers, for whom this publication is especially intended." Since the original title was confined to the years 1910–14 and the title of this volume is expanded to 1910–17, it may be expected that other volumes will be forthcoming. If so, we shall have a fair unilateral picture of the development of the so-called "secret treaties."

The book is evidently published in order to shock a radical audience with the wickedness of the wielders of power. However, the editing is without bias, though the material is incomplete. Reading the dispatches in the light of historical antecedents of the various questions discussed, one is impressed with how much energy was wasted trying to patch up impossible

counter-desires and how great a service the war explosion did in wiping out a ridiculous political past in which dynastic ineptitudes had attempted to fix permanently conditions that swore at common sense and sanity.

But while the material to work with was disreputable, one is also impressed with the decent insight into realities which was exhibited. A dispatch of Paléologue to Delcassé of September 14, 1914, for instance, gives Sazonov's terms for a victorious peace. One point is that "the territorial modifications must be determined in accordance with the principle of nationalities." It was only a year later that the Socialists put that thesis at their masthead and began selling it to the world. Austria, he thought, should be a "tripartite monarchy," consisting of Austria, Hungary and a kingdom of Bohemia, which should comprise "the present Bohemia and the Slovaks." Masaryk of Czechoslovakia apparently had assistance that he did not know of.

The correspondence as a whole throws into high light the pre-war habit of the "great powers" inventing vested interests in other people's countries, and their frantic, and not too intelligent, efforts to liquidate these claims in tangible form. The negotiation for Italy's entrance into the war was the only point, other than the Turkish declaration of war, that was definitely determined during the period of the dispatches. No essential additional light is thrown on either incident.

DENYS P. MYERS.

The Pathway of Peace. By Robert McElroy. New York: The Macmillan Co., 1927. pp. ix, 192.

This book is by a sometime professor of American history in Princeton University and more recently a professor of American history in Oxford University. It is a collection of lectures designed for auditors who had but relatively small knowledge of the subject treated. This subject, as stated in the sub-title, is an interpretation of some British-American crises; and the "pathway of peace" is the progress in British-American relations from war to law.

The first six chapters deal with the period from the Revolution to the Monroe Doctrine, and the seventh and last with the Venezuela Crisis of 1895 and the effort to procure a general treaty of arbitration which followed it. The Revolutionary struggle and the struggle for the Constitution are used to "debunk" some familiar legends and to illustrate the development of "the international mind," this last phrase being attributed to "America's greatest legal mind, Elihu Root." Washington's rejection of the French treaty of 1778 in the crisis of 1793, the Jay Treaty, Jefferson's embargo policy, the Monroe Doctrine, and the Venezuelan crisis, are used in successive chapters to illustrate, respectively, neutrality, negotiation, economic pressure, isolation, and arbitration, as substitutes for war.

The author's confession of faith as a historian is found on page 99, and is

expressed in Lucian's fine sentence: "A writer of History ought in his writings to be a foreigner, without a country, living under his own law only, subject to no king, nor caring what any man will like or dislike, but laying out the matter as it is." This high ideal is very well realized in Dr. McElroy's lectures, considering the circumstances under which they were given, despite some obvious criticism as to selection and emphasis. And in these days, when preparations for war between the two English-speaking peoples are being openly and strenuously urged, and when the widening of the field of arbitration between them is also being struggled for, it is well worth while to have had the story revived and popularized on both sides of the sea.

WM. I. HULL.

Handbuch des Abrüstungsproblems. By Theodor Niemeyer. Berlin: Walther Rothschild, 1928. 3 Volumes. Paper, Rm. 150; Cloth, Rm. 170.

This work is a very exhaustive study of disarmament and reduction of armament, compiled by a specially selected committee of the German Society of International Law. Volume I consists of eight parts, each a most detailed thesis on a particular phase of the subject. Volume II is a compilation of all arguments for, and projects of, disarmament or reduction of armaments from 1816 to the present day, including peace conferences, peace treaties, projects of a league of nations, and all treaties since 1919 which contain any clauses referring to the subject. Volume III contains all references to the subject made by the League of Nations or any of its subcommittees up to December, 1925. Volumes II and III are most valuable to anyone interested in the general subject, since no further reference libraries are necessary. Volume III, being verbatim reports of the League of Nations, is in French. Volume II is part French, part German, part English, depending upon the original quotation.

In Volume I, Part I, "Statement of the Question of Disarmament," Dr. Niemeyer defines disarmament, gives an historical sketch of the progress of thought along this line, and states the seven-part questionnaire which was propounded by the League 12 December, 1925.

Part II, "Historical Retrospect from a Military Viewpoint," is by Vice Admiral Hoppman. The author traces the trend of thought of disarmament through the nineteenth century, the Hague Conferences, World War Peace Treaties, and various other treaties and conferences since 1919, concluding that very little has been accomplished in the past and that the present generation must work out the problem in order that the future may be benefited.

In Part III, "Land Armaments," by General von Kuhl and Lieutenant Colonel Garcke, the following data are given for important European countries, the United States and Japan in a semi-tabular arrangement: area, population, size and organization of standing army, length and kind of service, militia, officer training, etc. The Geneva questionnaire is repeated, plus additional questions by the Belgian and British delegates. The subject

of armament is completely dissected—natural resources, manpower, defence systems, etc. For "defensive" armaments, the conclusion is that, with the possible exception of the Swiss defence system, there is no purely defensive armament. To be "defensively" organized an army must: (1) be composed of but a small part of the available man power, (2) lack offensive weapons, such as heavy artillery, tanks and aircraft, (3) not have mobilization plans, (4) have but about one battle day's ammunition supply. The basis of comparison of armaments is minutely discussed. Various methods of reduction are covered, concluding that Article 8 of the League Covenant will fail principally because France is not disposed toward reduction. Chemical and bacteriological warfare are discussed. Gas warfare is a matter of national policy. It could be outlawed but for the mutual distrust among nations. The League should either effectively prohibit gas warfare or else allow Germany to rebuild her airfleet and prepare chemically to be on an equal footing with her neighbors. France and her heavily armed hangers-on are the principal cause of the League's failure in universal reduction up to date, and that until such time as these nations change their ways the League will not be "founded on uprightness and honor."

Part IV, "Naval Armaments," is by Captains Vanselow and Gadow. Naval armaments include merchant marine, shipping industries, colonies, cables and radio stations as naval resources. Naval bases, coast defences, mobilization organizations, personnel and material reserves and an intelligence service are requisites of naval armaments. Naval armaments can be both "offensive" and "defensive," but in general they are termed according to the national aims. Limitation of naval armaments as per the Washington Conference, Rush-Bagot Treaty, etc., is discussed. Limitation ratios other than those used in the Washington Conference are suggested, such as (1) total warship tonnage, (2) limiting tonnage for each class of combatant ship, (3) displacement and/or number of ships per class, etc. Naval limitation must go hand in hand with military and aerial limitation. Washington and Geneva (cruiser) Conferences are discussed in detail. "This remarkable result (Five Power Treaty) was brought about by the circumstances that the United States was in a position of unquestionable authority, which had never previously been the case, that the British and American interests were similar against Japan, and that France and Italy were taken unawares."

Part V, "Aerial Disarmament," by A. Bauemker, is a short historical sketch of military aircraft and weapons, together with discussions of coöperation of land, sea and air forces. Maps, which are completely explained, are annexed showing the vulnerability of each of the European states to the aircraft of other states. The bases for reduction of aircraft are thoroughly set forth. International control of aircraft will have to be limited to non-military aircraft.

Part VI, "The Viewpoint of Economy," is by Dr. Colm. Economy is not only a motive for disarmament, but also a remedy. The cost of armaments

is never "productive," it is always an "unproductive" burden. The difficulties of comparing the costs of armaments of various states is taken up, with the solution that the best method is that of comparison of percentages of national incomes used for armaments. A tabular summary shows the costs of armaments of the principal countries, together with the size and organizations of their respective armaments and their incomes.

Part VII, "International Law and Disarmament," is by Dr. Simons, President of the Supreme Court, and Prof. Dr. Jahrreiss. Present disarmament will consist only of limitation of armament, effective without the erection of a super-state; through the decrees of international law. Any treaties concerning limitation must be protected against revisions. Regional disarmament is not practicable unless the disarmed area is guaranteed by a super-state or a powerful state. The questions of control of limited armaments and methods of settling disputes between parties to a limitations treaty are touched upon.

In Part VIII, "Policy and Disarmament," Prof. Dr. Bartholdy states that future war is entirely possible. Internal political reasons and national security cause armaments. The Madrid, Shotwell and Houghton plans for peace assurance are discussed, concluding in favor of the Houghton plan. Three essentials of policy are: (1) no separate alliances, (2) openness of armaments, (3) the acknowledgment of every citizen of his moral political duty of bettering his standard of living.

A. E. SCHRADER.

La primera Guerra entre Mexico y Francia (*Archivo Histórico Diplomático Mexicano*, num. 23). Edited, with a prologue, by Antonio de la Peña y Reyes. Mexico: Secretaría de Relaciones Exteriores, 1927. pp. xl, 347.

For almost five years subsequent to the overthrow of the Emperor Iturbide, Mexico enjoyed a period of political calm, but late in 1828 a revolution broke out which proved to be the prelude for a half century of turbulence that at times almost amounted to chaos. It was often accompanied by a hostility toward foreigners which increased the vexations and injuries usually characterizing such disorders. Of all the foreigners, the Spanish probably suffered most, and next to them the French. Not only did French capitalists fail to receive interest on their loans, but French retail merchants suffered business losses and French residents of all types suffered injury both in their persons and property. After negotiations extending over more than a year, the government of Louis Philippe transmitted (1838) to the authorities in Mexico City an ultimatum. Among other things, compensation for claims amounting to $600,000 was demanded, and when compliance was refused Vera Cruz was blockaded for the purpose of enforcing collection. The documents here presented bear upon the dispute, the blockade, the mediation of the British *chargé d'affaires*, and the final settlement of the difficulty. There are also one or two letters bearing upon French recogni-

tion of the Republic of Texas. Because one of the French claimants was a baker whose shop had been sacked by a mob, the whole affair often has been unjustly referred to as "The Pastry War." Some of the demands of Louis Philippe were extravagant, not to say preposterous, but others were probably just and reasonable. At any rate the incident furnished an interesting illustration of the readiness of the "Bourgeois King" to protect the interests of French nationalists in foreign lands.

J. FRED RIPPY.

International Civics. The Community of Nations. By Pitman B. Potter and Roscoe L. West. New York: The Macmillan Co., 1927. pp. xiv, 315. Index.

This is a book for "the student and the layman," presenting in elemental form a description of the community of nations, the nature of the problem "of securing peace and justice among the nations," and "what appears to be the path which must be followed in order to reach this goal." It is based on Professor Potter's *Introduction to the Study of International Organization.* Much the same chapter headings appear, and what new material there is has obviously been inserted for the benefit of the uninformed reader. The wisdom of devoting eleven out of the fifteen chapters to international law and organization, to the neglect of any discussion of the economic and political problems which make organization necessary in order that peace may be secured, is open to serious question.

The style is clear, and the tone judicious, without sacrifice of readability. Each chapter is followed by a list of definitions, study helps, and selected references. The book contains a liberal number of illustrations, aptly chosen, for the most part, but there is an unfortunate lack of maps. The Covenant of the League, the Statute of the Permanent Court, and the Constitution of the International Labor Organization are added as appendices. *International Civics* should prove very serviceable as a text in an elementary course, as well as of value to the general reader.

LELAND M. GOODRICH.

Théorie de la Société des Nations. By Robert Redslob. Paris: Rousseau & Cie., 1927. pp. 349. Fr. 45.

The author of this work is professor of law and political science in the University of Strassburg. He has dedicated his study to Dr. Max Huber, President of the Permanent Court of International Justice. Taken by the side of other recent books on the League published in the French language, such as those by Hoijer [1] and Gonsiorowski,[2] this work shows an increasing

[1] *La Solution Pacifique des litiges Internationaux*, reviewed in this JOURNAL, Vol. 21 (1927), p. 199.

[2] *Société des Nations et Probleme de la Paix. Ibid.*, p. 825.

volume of careful discussion of the theory and practice of the League on the continent.

The introductory topics present material calculated to lay a foundation for the main considerations later advanced. Attention is directed to the state, the law of nations, the state as a subject of law, modes of liaison between states, subjection, federal systems, and confederations. Part I, embracing three chapters, is devoted principally to the task of showing that the League is a confederation of states. Part II includes two chapters and a conclusion. Under the general heading of "The Problem of Stability" in Part II, the author compares the "League of Peoples" with the Helvetic Confederation and the British Empire. The conclusion is entitled "The Spirit of the League of Nations and the Conception of Nationality."

In discussing the legal status of the League, the author meets the sensitive point of juridical personality. He states that, even though a confederation of states rather than a federal state, the League has certain attributes of a juridical personality. Certain features of the work of the League maintain continuity even though there may be variations in the activities of the society (p. 44). The mere interpretative functions of the League should be distinguished from its creative or directive functions. The coercive measures lie in the field of international law, not in field of the constitutional law of the League. Before the creation of the League but following the World War, the great Powers possessed the sovereignty of the territories later mandated. Since the mandate system established by Article 22 of the Covenant, a division of powers has occurred. Direct power has been transferred to the mandatory state, while sovereignty rests in the League (p. 200). The League has the right to revoke a mandate and to appoint new states to succeed the ones displaced (p. 192).

In his conclusion Dr. Redslob states that the League would be doomed to failure if it displaced a single stone in the temple of the conception of the individual nation, which he characterizes as a "phenomenon of volition," a coalition based upon a "free choice," a subjective phenomenon rather than a state of things. The spirit of Geneva is a force not dissolving the ties of country but regulating the states of the world. It will not be able to fulfill its destiny until a new spirit animates the people,"a spirit comparable to that pan-Britannic mentality which we have discussed." Nationalistic propaganda must no longer be allowed to cloak imperialistic designs. The Helvetic cantons, the German States, the United States of America, and the British Empire, furnish examples of dual loyalties where the people recognize claims broader than those of their own localities. "The League of peoples does not destroy individual nations, but elevates and ennobles them." The universal Church of the middle ages and the Holy Roman Empire are discussed from the standpoint of showing dual loyalty to secular and ecclesiastical authorities. The two limits bounding

the spirit of the League are (1) a sane comprehension of national honor and (2) a penetrating vision of the interdependence of people.

This work is a very useful contribution to the more careful analyses of the League.

JOHN EUGENE HARLEY.

Les Effets des Transformations des Etats sur Leurs Dettes Publiques et Autres Obligations Financières. Par A. N. Sack. I—Dettes Publiques. Paris: Recueil Sirey, 1927. pp. xvi, 608.

The six hundred pages of this volume, while relating to public finance, touch upon many fundamental concepts of international law and the conflict of laws. From diverse practice Professor Sack tries to formulate rules of what ought to be. The incidence of obligations in case of state succession is not easy to determine and has not always been uniform. While in theory the funds gathered in the public treasury should be used for the public good, there is no accepted standard as to what constitutes the public good. For the party making the loan to presume to judge that the borrowing state would not use it well might involve decisions not warranted and not desirable. From the legal point of view the question would ordinarily be, has the state or the political entity the legal competence to borrow? The share which should be allocated to each part on the partition of a state has not yet been subjected to a formula. The reader of this work of Professor Sack may find much with which he feels inclined to disagree, but he will find it exceedingly difficult to question the sincerity of the effort of the author to canvas thoroughly data upon public debts. Indeed this study is one to which all students of financial problems consequent upon partition of states must refer, and puts students of international finance and of international law under great obligations to the author, who has assembled such a wealth of material in such an admirable form.

GEORGE GRAFTON WILSON.

History of American Foreign Relations. By Louis M. Sears. New York: Thomas Y. Crowell Co., 1927. pp. xiii, 648. Index. Map. $3.50.

This work follows in general the lines laid down by recent writers in the same field, such as, for example, Johnson's *American Foreign Relations*, Fish's *American Diplomacy*, R. G. Adams' *History of the Foreign Policy of the United States*, and Latane's *History of American Foreign Policy*.

After a preliminary chapter on the Colonial Period explaining the economic situations and theories of the time, the author traces clearly and carefully the international relations of the United States with foreign Powers, following a chronological order, and giving numerous references in footnote form. The personal characteristics and inner motives of the leaders in diplomatic relations are stressed, thereby adding to the attractiveness of the narration. The author in his discussions aimed to include relevant matter only and to

omit useless details, and in this he has measurably succeeded. At the end of the volume are given carefully prepared bibliographies for each of the twenty-nine chapters, a useful Chronological Table, and the conventional list of Secretaries of State. The book itself is neatly printed and forms an attractive volume in appearance.

The author, as a teacher of history, naturally gives most attention to relations with Europe and more especially those with Great Britain and France. Territorial expansion also is well emphasized, aided by the inclusion of a colored map showing accessions. His discussions down to 1898 are satisfactory and quite complete, although he neglected to mention negotiations with the Barbary Powers in connection with the war of 1815, though earlier dealings with those Powers are given.

On the other hand, the stirring situations from 1898 to 1927 are condensed into about 150 pages and some important aspects of our foreign relations are consequently slighted or ignored. One forms the impression that there was undue haste in the preparation of these later chapters. The work of the Pan American Congresses during this century, for example, is not discussed, nor the present significance of the economic and other activities of the Pan American Union. There is merely a bare reference to the Nicaraguan and Mexican situations, there is no mention of the conferences of 1907 and 1923 with the Central American States, or the settlement of the title to the Isle of Pines, nor are relations with Canada referred to after the Taft Administration. The account of the Washington Conference contains several slight inaccuracies, and one wonders why the non-fortifications agreement, and the Nine Power series of agreements respecting China, were not deemed worthy of mention and explanation. Surely also the negotiations with Turkey voiced by the proposed Lausanne treaty should have been noted. In general, therefore, it may be said that the discussion of foreign relations since 1898 is inadequate and that the author seems to be not so much at home in situations involving the Far East and Latin America as he is in the discussion of our foreign relations with Europe.

The volume as a whole, however, is written in good style and attractive English. It is well adapted for class room use, and should attract the attention of business and professional men interested in the history of American foreign relations.

J. Q. Dealey.

China and the Occident: The Origin and Development of the Boxer Movement. By George Nye Steiger, Ph.D. New Haven: Yale University Press. London: Oxford University Press (Humphrey Milford), 1927. pp. xix, 349. $3.50.

At a time when revision and re-evaluation constitute the order of the day in matters historical, it is not surprising that the Boxer Movement should tempt an American historian to undertake its reconsideration. The results

are extremely interesting and—provocative. The first six of the thirteen chapters of the work constitute an excellent survey, factual in part but mainly ideological, of the relations of China with the West from the sixteenth to the end of the nineteenth century. Of outstanding interest are the fundamental differences between Chinese and European conceptions of government, particularly of the government of China; the unfortunate inter-relations of the religious and political factors in Christian missionary work in China; and the light thrown on the methods (somewhat different from those traditionally stated) used by the British Government in bringing about the lease of Wei-hai-wei in 1898. The practical significance of the first two of these factors has come to be generally understood only within the past few years. The importance of the concurrent developments of the Hundred Days' reform and the Battle of the Concessions is clearly outlined, as is the attempt of the Empress Dowager to bring about reform through conservative channels. If there is comparatively little that is new in this part of the work there is, nevertheless, a masterly gathering together of threads for the weaving of a colorful tapestry.

Approaching his main thesis in Chapter VII, Professor Steiger sets forth the two theories of the origin of the Boxers: first, that the Boxers were members of an illegal secret society, the I-Ho-Chuan (Righteous Harmony Fist), which had existed since the first part of the nineteenth century; second, that they were the local militia, I-Ho-Tuan, recruited in accordance with specific decrees of the Empress Dowager. The latter theory is vigorously upheld. If, however, it contains *all* the truth, is it not strange that Yuan Shih-k'ai, as acting governor of Shantung, should have received an Imperial Edict in February, 1900, "severely denouncing the Society of the 'Fist of Righteous Harmony'," and, in commenting upon the Boxers, have referred to them as members of "perverse societies"? In passing it may be noted that Yuan was not "primarily a military officer" (p. 156), but a civil official appointed to military office by decree of the Emperor Kwang Hsu in September, 1898.

Passing to a consideration of the military phases of the Boxer outbreak, the author is moved to severe criticism of the attitude and actions of the diplomatic corps in Peking, and of the naval officers who seized the Taku forts on June 17, 1900. He is inclined to rate the statements of the imperial officials as of equal weight with those of the foreign representatives, which he is certainly not warranted in doing. Whether the seizure of the forts constituted a declaration of war or not, it is well to bear in mind that before it occurred the Boxers had burst into Peking pillaging, burning and massacring, and had threatened the occupants of the legations, while in Tientsin all the mission chapels and the French Catholic cathedral had been burned.

In attempting to minimize the responsibility of the Empress Dowager and her advisers, Dr. Steiger casts doubt upon "the alleged edict of June 24" in which the indiscriminate slaughter of foreigners was ordered. Al-

though the authenticated *Diary of Ching Shan* specifically refers to the edict more than once, these references are dismissed as being merely circumstantial. He quotes Dr. A. H. Smith's *China in Convulsion* containing the statement "twice at least, the original despatch was seen by foreigners," criticizes the writer on the ground that "he neglects to cite these important witnesses by name"—but, strangely enough, makes no attempt to solve the problem by challenging Dr. Smith personally. Consulted by the reviewer on this matter, Dr. Smith on January 30, 1928, replied:

> Twenty-eight years form quite a period of time in which to forage for obscure facts, but as it happens this item is engraved on my memory very distinctly, because the actual sight of the decree was so vital a proof at that time that if once known it *could* not be forgotten. The two yamens concerned were those of the governors of Shensi and Shantung. The foreigner in the former city was Mr. Moir Duncan, who had been in Peking as interpreter to a British regiment. . . . He told me that he went to the governor's yamen to get information in regard to the ugly rumors that such a decree had been issued. The governor was the well known Tuan Fang (a Manchu) who was one of the best of his class. The dispatch, as I remember, was frankly avowed by the governor. When Mr. Duncan inquired: "And what are you going to do about it?" H. E. Tuan Fang replied: "*Chieh li ti pao-yu.*" [Protect to the utmost.] I recall this phrase clearly. . . . The other governor concerned was Yuan Shih-k'ai, and the paper was accidentally left exposed so that the foreigner (whose name I can not recall) saw it, and Yuan made a remark similar to that of Tuan Fang, and we all know how well he lived up to his promise.

Although it may be doubted that the last word has been said regarding the Boxer movement, the study under review is of exceptional value on account of its approach from an unusual angle. If not entirely unbiased, the work is scholarly and is the result of much study and thought. There is an excellent critical bibliography in which but one error was noted: (p. 322) T. T. Meadows was not "one of the missionaries who accepted the Taiping Rebellion as a Christian movement." From the knowledge of China with which Meadows wrote one might conclude that he was a missionary; as a matter of fact he was first an interpreter and later one of H.B.M.'s consuls in China. Splendidly printed and bound, Dr. Steiger's work is a fine example of book-making.

HARLEY FARNSWORTH MACNAIR.

France and America: Some Experiences in Coöperation. By André Tardieu. Boston and New York: Houghton Mifflin Co., 1927. pp. vii, 312. $3.00.

M. Tardieu, it would seem, has taken a leaf from the American diplomacy which he studies, and has written a frank book. It is not a documented study of Franco-American diplomacy, but an analysis of the various influences which have produced that diplomacy. He seeks to explain why the

"two countries, bound by such ties of sympathy, have never made a combined effort that was not followed by immediate rupture"; and he attacks the problem with his usual forcefulness and clarity of style, and with a sincerity and objectivity which leaves no possible ground for offense.

The first chapter is devoted to contrasts between the two peoples: stability as against motion; nationalism as against liberty; individual progress as against social progress; centralization as against decentralization; revolution as against conservatism ("In America, even revolutions are conservative!"); religious dogma as against religious peace; homogeneity as against immigration; a primary political as against a primary economic interest; the struggle for existence as against unlimited potentialities—everything different but the common label of democracy! In the following somewhat unrelated chapters are discussed the development of the French spirit, historically; America's coöperation in the war, with an interesting description of her abandonment of a national principle of neutrality for a narrowly nationalistic and selfish war; the problem of reconstruction in France, and American aid therein; and America's actual share in the war, with the rupture following.

A final interesting chapter depicts the faults of each state which have resulted in the present misunderstanding. "Europe is anxious because weak, America imperious because strong." France lives in the past, nourishing the deceptions which she has suffered from America; France has not displayed the success in action which alone commands American respect; France is too much interested in politics. The United States, on the other hand, has an overweening pride: they are "filled with an unconquerable assurance that alone in a shaken world they possess the instinct of what is right." American diplomacy is unstable and empirical, adjusted to each party campaign: "There is no country with which international coöperation is so difficult, no diplomacy at once so overbearing and evasive." Never, he says, has a country with so great an opportunity pursued so puny a policy; and the result is that "once the idol of Europe, she is today without a single worshipper." Each country, in ignorance of the other, shapes its policy according to its own habits of thought. M. Tardieu has written his book in the hope of better mutual understanding; but it would not be unfair to read between the lines his belief that there is little hope of understanding until the United States abandons her conviction of omniscience.

CLYDE EAGLETON.

The Neutrality of the Netherlands During the World War. By Amry Vandenbosch. Grand Rapids: Wm. B. Eerdmans Publishing Co., 1927. pp. xii, 349. Index. $4.00.

Professor Vandenbosch's study is among the first scholarly analytical treatments of the peculiarly difficult juridical problems confronting the limitrophe neutrals during 1914–1918. His valuable monograph appraises the development of Dutch neutrality in the main from the legal standpoint,

the political and social repercussions being left to the historian, while, of necessity, the economic consequences are only incidentally treated.

The author approaches his evaluation by noting the marked development of neutrality regulations during the World War, due to the advance in electrical communications and the revolution in aërial and sub-surface navigation. Placed in the midst of the problems created by the new technical developments of modern warfare, Holland's decisions as to her proper course of conduct were as difficult as they were novel, and gave to her neutrality regulations a distinctive character. Analysis of these reveals outstandingly the differential treatment accorded the mother country and the colonies, particularly in regard to the admission of armed merchantmen. The stringent interpretations placed upon certain duties formerly regarded as those of hospitality, and the invoking of the penal sanctions of Netherland law for the violation of the neutrality regulations are also noteworthy. Peculiarly, the regulations regarding radio, aircraft, internment and the navigation of the Scheldt were not covered by the main proclamation of neutrality, but were dealt with by special decrees. These, with other salient documents, are appended to the text.

Following this preliminary sketch of the legal framework of Dutch neutrality, the author discusses, in Part II, the specific problems in the enforcement of neutral duties, devoting a chapter in turn to the sand-and-gravel controversy, the navigation of the Scheldt, the transit of belligerent troops across Holland after the armistice, the enforcement of air neutrality, and the admission of belligerent warships, of armed merchantmen, and of prizes into Dutch territorial waters. These highly controversial matters are all well documented and critically and dispassionately handled. Professor Vandenbosch's exposé of the various measures prohibiting radio communication, preventing minor violations of neutrality and procuring or facilitating internment is systematic and clear. One may question, however, whether the Dutch really overstepped the mark by too zealous an internment of salvaged craft. Such are hardly comparable to persons, as is maintained by the author (p. 171). There is an interesting chapter on the right of asylum, vindicating the Dutch attitude in the case of the Kaiser.

Part III of the study is devoted to the controversies over neutral rights, chapters being given to blockade and retaliation, contraband and unneutral service, visit and search, neutral convoy, destruction of neutral prizes, and angary as illustrated in the requisitioning of Dutch vessels. The treatment of blockade is exceptionally discriminating and the appraisal of "The Future of Blockade" of particular value.

The author's concluding observations, in Part IV, stress Holland's need of additional regulations, amplifying the letter and adapting the spirit of the Hague Conventions to the changed circumstances of aërial, land and maritime warfare. High tribute is paid to the standards of conduct adopted by the Netherlands, which were frequently in excess and in advance of the

requirements set by customary and conventional international law. The controversies between Holland and the principal belligerents are believed to have established a clearer conception of neutral duties, but "a tremendous diminution" of neutral rights is regretfully admitted. Despite the need of restating the rights of neutrals in formal codes of international law, Professor Vandenbosch holds that the times are not propitious, and that codification should not be attempted until memories of the late war have receded and the League of Nations has taken sufficient root to determine the future prospects of neutrality.

MALBONE W. GRAHAM, JR.

Les Mandats Internationaux. By D. F. W. Van Rees. Paris: Rousseau & Cie., 1927. pp. 145. Fr. 20.

No one is better qualified to speak about the mandates system than Dr. Van Rees, distinguished vice-president of the Mandates Commission. He has attended every meeting of that body, has entered vigorously into all discussions, especially on points of law, and through his careful reports has contributed greatly toward defining the legal relations of the commission, the Council, the mandatories and the peoples under mandate.

The present book, although not as comprehensive as some which have been written on the subject, may be considered the most authoritative discussion of the mandates system. The author, however, is cautious. His book consists in large part of quotations, especially from the proceedings of the Council and the commission, and he does not often commit himself on uncertain points. Thus, after discussing the various theories with regard to the location of sovereignty of the mandated territories and indicating the weakness of each, he says: "After all, for the application of the system it is less important to establish to whom the right of sovereignty in the different territories belongs, than to know whether it is the mandatory Powers which possess this right." To this he unhesitatingly replies in the negative, with ample support from the documents and Council decisions (p. 22).

Throughout the author emphasizes the mandatory's function of tutelage: "That which constitutes more than all other elements, its novelty, its importance, and its value is the legal recognition of minor *peoples* inhabiting the territory who enjoy a juridical personality distinct from others; the obligation implied by the character of the mandatory's authority to guide these peoples toward their majority, to make the administered territories evolve first toward autonomy, finally toward complete independence; the creation in final analysis of a system of *national* responsibility under the control of an *international* collectivity" (p. 10). With this view it is not surprising that, without committing himself, he shows a certain partiality for "the only theory which takes account of the principle of non-annexation adopted by the Peace Conference," namely, the theory of suspended sov-

ereignty or virtual sovereignty of the mandated communities themselves while the exercise of sovereignty is vested in the mandatory as guardian (p. 20).

Careful description of the functions of the Assembly, Council, and commission of the League in the system is offered, most of the book being devoted to the latter. The commission's organization, competence, and procedure are given in great detail, emphasis being continually placed upon its advisory character and its dependence for results upon a good public opinion, a spirit of coöperation with the mandatories, and able work by the commission itself. The author insists, however, that its competence extends not merely to seeing that the mandatories keep within the limits of their powers, but also "to examining whether they have made good use of these powers and whether the administration has conformed to the interests of the indigenous peoples" (p. 139). Thus he justifies the long questionnaire which caused some of the mandatories in 1926 to question whether the commission was not going beyond its competence. M. Van Rees admits that the commission finds some difficulties in performing this dual task, but he is convinced that it has done its work conscientiously and in doing so has contributed toward the success of "one of the happiest innovations born of the war and universally recognized as one of the noblest results of the Versailles Treaty" (p. 2).

QUINCY WRIGHT.

Völkerrechtsfragen—eine Sammlung von Vorträgen und Studien, herausgegeben von Heinrich Pohl und Max Wenzel. Berlin: Ferd. Dümmlers Verlag, 1927.

19. *Heft: Deutsche Luftrechtspolitik seit Versailles*, von Werner Bartz. pp. 49. Rm. 3.
20. *Heft: Die Beschränkung der deutschen Souveränitat nach dem Versailler Vertrage*, von Dr. Hans Gerber. pp. 84. Rm. 4.
21. *Heft: Die Abänderung völkerrechtsgemäszen Landesrechts*, von Dr. G. A. Walz. pp. 174. Rm. 6.75.

These three monographs are recent additions to a series which sheds valuable light on the direction and interests of current German thought in the field of international law studies.

The first reviews briefly the provisions of the Versailles Treaty restricting the possession and manufacture of aircraft by Germany and summarizes the various steps taken by the Allies and the German Government to carry out the treaty provisions. The terms of the treaty are criticized as inconsistent with the "deceitful Wilsonian promises" of the armistice agreement and as dictated by a "blind frenzy of destruction," and the writer claims that the later acts of the Allies in enforcing the treaty were arbitrary and in excess of the treaty provisions. He objects especially to the basis of

distinction laid down between civil and military aircraft and the delay made in reaching it. To base this distinction, as was done, on comparative facility of conversion to military uses "is erroneous." It had the necessary effect of introducing "supervisory competence over civil aircraft, which does not correspond to the intention of the supervision." The substitution in 1922 of the "Civil Aviation Guarantee Committee" for the "International Aviation Supervisory Commission" "opened the door to a comprehensive industrial espionage by the Entente"; the regulations of 1925 increased the severity of those of 1922. "An unexpected consequence was to stimulate German builders and inventors to devise the best permitted aircraft types and thus to elevate aëronautic technique in Germany to a scientific point reached in no other country" (p. 15).

Lieutenant Bartz adopts, with some reference to the conflict of authorities, the doctrine of legal supremacy of the territorial sovereign over the air in preference to the doctrine of freedom of the air advocated by Fauchille and others. But "the Versailles Treaty with its provisions regarding civil and military aviation annihilates Germany's sovereign rights in the aërial domain" (p. 25). Nevertheless "the peace-treaty in no way limits the freedom of German civil aviation" (p. 35). The decisions reached at the Paris Conferences of 1926, following the Locarno adjustments, released German commercial aviation from restrictions and abolished control by the "Inter-allied-Aviation-Guarantee Committee" (p. 38). Military aviation remains, however, absolutely forbidden. While acknowledging that the value of the Paris decisions should not be underestimated, the author regards them as defective in not permitting Germany to arm herself in the air to resist possible aërial attack. "The right to maintain a fighting aircraft force is a basic right of states" (p. 48).

The monograph by Dr. Gerber on "Limitations of German Sovereignty under the Versailles Treaty" is also primarily a polemic against the treaty. The author defines sovereignty as "legal capacity," and then draws a distinction between "legal capacity," which he regards as the essential element of legal personality, on the one hand, and mere "capacity to act," which is often limited, as in the case of minors, on the other. He argues that modern private law no longer permits a complete denial of legal personality to any class of individual human beings, and he transfers the same principle to states in the field of international law,—"the basic principle of international law is the inherent legal capacity of states." Their capacity to act may, however, be limited, but only on "objective" absolute grounds, and not at the "arbitrary subjective judgment" of other states. These principles he regards as violated by the limitations imposed by the Versailles Treaty on Germany. Her legal capacity was denied in that she did not share in framing the treaty, which was imposed on her. The same denial was involved in her exclusion from the League of Nations, in the insult to her "national individuality" involved in the amputation of territory, and in her

compulsory disarmament. In addition, her "capacity to act" is regarded by the author as infringed by the treaty provisions concerning reparations and the administration of the reparations clauses. Dr. Gerber ends on a political note: "Shall we quietly acquiesce in this situation? There can be only one opinion, that the highest task for Germany is to win back her sovereignty and free it from all limitations."

Of a very different character is Dr. Walz's monograph, the title of which may be translated as "The Alteration of International Law Precepts Which Form Part of the Law of the Territorial Sovereign." This very careful and scholarly study deals in an exceptionally broad and yet precise way with one of the basic problems of international law. From what source does a precept of "customary" international law or a treaty provision derive its validity in the courts of the territorial sovereign? What is the effect if there stands on the statute books an inconsistent enactment of the sovereign legislature? Dr. Walz adopts the position of Triepel with its recognition of the duality of the two forums—international and territorial. This requires him to admit the possibility of valid municipal law which may be at variance with international law, in opposition to the position of monistic theorists like Verdross and Potter who evade the difficulty by treating both kinds of law as parts of a single system. Walz admits the place of conflict as inherent in the present state of the world's legal organization, and then raises the question: "What means are available to the different systems of national law as at present fixed to obviate so far as possible contradictions between internal municipal law and international law?" (p. 5). Accepting the view that international law as enforced in the courts of the territorial sovereign is only a part of municipal law, he reviews the doctrines prevailing in the English, American, and German legal systems as to conflicts between international law precepts and the enactments of the territorial sovereign, and finds all three systems in substantial agreement on the result that the legislature may vary or abrogate the law of nations so far as its own courts are concerned, but that the courts ought never to construe a statute as having this effect unless the legislative intention to produce it is clear and definite. At this point he introduces an original contribution in the form of a suggestion that the courts should never attribute such an intention to the legislature unless it is express—"an intention to derogate" from the international law precept (including the obligation of treaties) "is to be assumed only when, and only in so far as, the statute expresses such an intention *expressis verbis*" (p. 69). The reasoning upon which Dr. Walz grounds this suggestion illustrates the value of his method of approach, irrespective of whether or not we agree with his result. His argument is that if the rule is stated in the usual form as a mere rule of presumption in interpretation, the final responsibility for abrogating an international obligation will rest upon the courts; it will be for them to say whether or not the obligation is abrogated. But this function is really not a proper one for a judicial body,

as it is of an essentially political character. "Externally the entire responsibility rests on the shoulders of the legislator, never on the judge who through his power of interpretation participates in the legislative process. The play of judicial freedom of decision must be narrowed in the interest of legislative responsibility" (p. 80).

The timeliness and importance of the problem to which Dr. Walz has addressed himself is emphasized not merely by the tendency which he notes for "natural law" concepts to re-emerge in times of transition like the present, but also by the fact that Article IV of the new German Constitution provides that "the generally recognized principles of the law of nations are accepted as an integral part of the law of the German Commonwealth." To the meaning and effect of Article IV the second half of the monograph is devoted. There has been much controversy in Germany as to the scope of the "generally recognized principles of international law" thus transformed into municipal law. With obvious reference to the Versailles settlement, the issue has been raised as to whether rules owning their existence to treaties are included. Walz rejects the distinction between so-called "objective" and "subjective" law in the international field, and therefore concludes that treaty-made rules come technically within the description of Article IV; but because of other provisions of the Constitution, relating to promulgation and ratification of treaties by the Reichstag, he holds that the operative force of Article IV is limited to transforming "customary" international law into the law of the land. Treaties become internal municipal law only through the requisite processes of promulgation or ratification (p. 147).

Not the least value of this study lies in the numerous penetrating digressions into fundamental problems of legal theory, such as the possibility of a logically consistent legal system (pp. 9 ff.), the nature of the growth of law (pp. 73 ff.), the essential differences between international law and positive law (pp. 107 ff.). The text and notes disclose a wide familiarity with the literature in English and German, and afford a useful guide to the significant books and articles.

JOHN DICKINSON.

State Security and the League of Nations. By Bruce Williams. Baltimore: The Johns Hopkins Press. 1927. pp. x, 346. Index. $2.75.

The book under review comprises a series of lectures given at Johns Hopkins University under the Albert Shaw Lectureship on Diplomatic History. The first of the series were delivered by John H. Latané in 1899. The lectures by Dr. Williams were given in 1927.

For the first time in its history the lectureship has dealt with a question of world interest (state security) and an organization of world magnitude (the League of Nations). Former lecturers have dealt with a period or phase of

American diplomatic history, with the relations between the United States and a particular country, or with the affairs of a region of the world. This fact is noteworthy, not alone because of what appears to be a departure in policy, but also because it illustrates in a striking way the tendency to stress principles of world-wide application and interest, rather than to deal with diplomatic episodes which are merely transitions or stepping stones along the path of international progress. Both types of research are essential to international understanding.

Dr. Williams treats his subject under the following heads: the principle of the right of the state to existence; Article 10 of the Covenant of the League of Nations; Article 16 of the Covenant; attempts to extend certain principles of the Covenant; and the Locarno agreements. There are included an appropriate introduction and conclusion. In the annexes Dr. Williams has included pertinent extracts from the documents which have formed the basis of his discussion. The value of the book is enhanced by this means of ready reference to the controversial provisions of documents.

Dr. Williams inquires into the movement for a more effective juridical order of international society, and into the attitude of the members of the new society toward some of the new legal relations established by the constitutional law of that organization (the Covenant). The author confines his attention to the important problem of security, and to the sanctions which are provided for its maintenance. The first such sanction is the joint guarantee of territorial integrity and political independence of the League members. This principle has been repudiated in the United States; and the members of the League, while professing adherence to it as a guiding principle of the League, do not accept it as an absolute guarantee of existing frontiers. The feeling prevails that some of the territorial settlements are unjust and contrary to sound economics. The sanctions under Article 16, which amount to war, and to several forms of non-intercourse, are fully discussed, based, not on actual cases, but on interpretative resolutions of the Assembly and the Council. The failures of the draft treaty of mutual assistance and of the Geneva protocol are chronicled, as is the final success of the security agreements through regional arrangements known as the Locarno pacts. One is left with the impression, and a true one, that the League has failed to agree on a definition and interpretation of its provisions as regards territory and sanctions, and that it has failed, through its own organization, to extend these principles in keeping with the drift of need and opinion since the war.

One may well question the suggestion of Dr. Williams that the questions now left to the exclusive determination of states should be brought definitively within an authoritative and final international jurisdiction. The enlargement of the categories of disputes which are arbitrable or justiciable; the establishment of obligatory international arbitral or judicial process; and the inclusion of so-called domestic questions within the list of international ones,

are favorite suggestions about which much is said but little or nothing is done. The use and improvement of existing processes and machinery might lead to better results.

It is clear that the sanctions and security provisions of the Covenant are inadequate. What the members could not do through common agreement the interested parties have been able to do through regional understandings. It seems to prove that the League cannot yet deal effectively with the question of security, and that the idea cannot be dissociated from the primary interests and needs of the affected nations. Security and regionalism, it is again proved, go hand in hand. Whether the revision of the inadequate sections of the Covenant will take the course of rendering them adequate to present exigencies, or whether there is to be a complete break with the past, immediate and remote, is an interesting speculation. The fact of inadequacy and the need of revision are obvious conclusions, after reading this scholarly, timely, and interesting contribution to international law.

CHARLES E. MARTIN.

BOOK NOTES

Naval History in the Law Courts. A Selection of Old Maritime Cases. By William Senior. (New York: Longmans, Green & Co., Ltd., 1927. pp. x, 114. Index. $2.50.) The subtitle might have been made "Stories of Old Maritime Cases." These show that the "good old times" were not preeminently marked with justice in maritime decisions. The stories range from Sir Francis Drake's conduct, through piracies, impressment, scuttling, treatment on "crossing the line," marooning, desertion, slave trading, and similar interesting matters which came before the courts. The book avoids footnotes and references but is "curious and entertaining."

Les Organisations de Blocus en France Pendant La Guerre (1914–1918). Publié sous l'inspiration de Denys Cochin par un groupe de ses collaborateurs: MM. Jean Gout, Fouques-Duparc, Francis Rey, Jean Tannery, de Montardy, Thilly, vice-amiral Amet, Martin-Saint-Leon. (Paris: Plon-Nourrit & Cie., 1926. pp. ix, 291.) The plan of this attempt to set forth briefly the efforts of France from 1914 to 1918 to cut off its enemies from the essentials necessary for war was projected by the late Denys Cochin. Those whom he had joined with him carried out in large measure his plans. As Minister of Blockade, Denys Cochin had conceived his functions in a broad sense and his collaborators followed his ideas. After an historical review by M. Jean Gout, M. Fouques-Duparc describes the method of control of means of communication, telegraph, radio, telephone and post. M. Rey shows how supplies were limited by rationing neutrals, etc. M. Tannery treats financial restrictions and relations of neutrals, while M. Montardy refers briefly to the interruption of trade with the belligerents and the prize

court. The submarine menace from Germany is discussed by Vice-Admiral Amet, and the closing chapter on the economic measures and other efforts to restrict intercourse with the belligerent is by M. Martin-Saint-Leon. While the book is not a treatment of blockade in the technical sense, it shows the extension of some of the principles during the World War.

G. G. W.

Quakers and Peace. Edited, with introduction and notes, by G. W. Knowles, M.A. (London: Sweet & Maxwell, Ltd., 1927. pp. iv, 52. 2s. 6d. net.) This is one of the "Texts for Students of International Relations" published by The Grotius Society. It is No. 4 in the series, following those on Erasmus, Sully and Grotius. Its introduction of fourteen pages gives a slight sketch of the opposition of the Quakers to war, from 1650 to 1918, one-half of it being devoted to the stand taken by the "Conscientious Objectors" during the World War. The Selections from the writings of Friends (which fill the remaining two-thirds of the book) are designed to illustrate the reasons why they have exemplified opposition to war in favor of some better method of dealing with relations among nations. About half of these are from the writings of Fox, Penn, Barclay and other Friends of the seventeenth century; the other half are from the last two centuries and a quarter. The introduction and selections support the thesis that the Quaker opposition to war rests upon a three-fold basis, namely, that it is expensive, inefficient and wicked; that there is a legal substitute for it, which is entirely practicable and efficient; and that the religion of the New Testament and the Inward Light demands a veneration for the personality of all men and an attitude of friendship towards them which will remove the causes of war and promote peaceful coöperation for human progress.

W. I. H.

Report of the Thirty-fourth Conference of the International Law Association. (London: Sweet & Maxwell, Ltd., 1927. pp. cxcix, 742. Index. £2.) At its session in Vienna in August, 1926, the International Law Association adopted a draft convention on maritime jurisdiction in time of peace and considered another draft on maritime neutrality. Much attention was given to a draft statute of an international penal court, which was finally adopted, with accompanying resolutions approving the creation of an international criminal division of the Permanent Court of International Justice, and containing recommendations as to the jurisdiction of the court and the law to be applied. A report on the protection of private property against expropriation without compensation was warmly debated, and a series of resolutions adopted on the subject which confirm the principle of inviolability and the right of intervention to protect it. A report on the rights of minorities was presented and three proposals adopted for improving the procedure of the League of Nations Council. A report on collaboration with the League of

Nations committee for the codification of international law was submitted and approved, and a series of separate papers on various topics of codification referred either to the League of Nations committee or to the Executive Council of the Association. Upon the report of the Aerial Law Committee a series of resolutions was adopted recommending, among other things, the embodiment of the principle of sovereignty over the air spaces in an international radio convention. In a separate section, the Association considered a number of problems of maritime and commercial law. The reports, drafts, papers, debates and resolutions are available in the printed report of the Conference.

Transactions of the Grotius Society. Vol. 12. (London: Sweet & Maxwell, Ltd., 1927. pp. xliv, 123. 7s. 6d.) The papers read before the Grotius Society in the year 1926 deal with a variety of subjects, most of them of timely interest. Professor Gilbert Murray traced the development of the Locarno Pact from the Treaty of Mutual Assistance and the Geneva Protocol, and showed its relation to the League of Nations Covenant. Mr. Herbert F. Manisty made a daring suggestion that the League of Nations should have jurisdiction over the question of immigration under certain circumstances. Mr. James R. Keeley discussed the effect of the end of war on pre-war treaties between belligerents. Mr. F. W. Sherwood read a paper on the career of Suarez and his contribution to international law. Mr. D. Campbell Lee discussed, somewhat superficially, the legal position of mandates and how the system is working. Mr. Sanford D. Cole contributed a reasoned essay on the principles which should govern the codification of international law. The problem of *renvoi* in private international law was carefully treated by Mr. Frederick Allemès with references to leading cases. Dr. Pieter Geyl, of Leyden, gave a very interesting account of the political and religious conditions in Holland which led to the exile of Grotius. Mr. F. Llewellyn Jones, under the title "National Minorities in the British Empire," surveyed the legal position of linguistic minority groups in Wales, Ireland, French Canada, and South Africa.

Annuaire de la Société des Nations, 1920–1927. Prepared under the direction of Georges Ottlik. (Lausanne and Geneva: Librairie Payot & Cie. and Les Éditions de Genève, 1927. pp. xxviii, 1005. Maps, ils. Cloth, 25 Swiss francs.) A more useful compendium of information concerning the League of Nations and its multiforum activities has not come to our notice than the first issue of this *Annuaire.* In scope, it approaches an international statesmen's year book and "Who's Who" combined, and its subheadings assume almost encyclopedic proportions. A series of indexes of persons, subject-matter and resolutions of the League make the contents easily accessible, especially to those who are not familiar with the framework of the League of Nations and its numerous subordinate and auxiliary organizations which

the *Annuaire* follows in logical sequence. While the volume is not an official publication, the Secretary-General of the League states, in a foreword, that the members of the Secretariat assisted the author in compiling the material on which it is based. The editor was formerly in the Austro-Hungarian diplomatic service, and later engaged in international newspaper work. The book was intelligently planned and has been well executed. Its use will save hours of research in numerous official documents not always brief, clear, or impartial. It is to be hoped that the French edition will be sufficiently successful to encourage the author to publish an English edition.

Third Annual Report of the Permanent Court of International Justice. (Publications of the Court, Series E, No. 3. Leyden: A. W. Sijthoff's Publishing Co., 1927. pp. 426.) Each issue of these annual reports contains some improvements over the preceding ones. The Third Report, covering the period June 15, 1926, to June 15, 1927, follows the plan of its predecessors and brings up to date the information concerning the Court and registry, jurisdiction, judgments, advisory opinions and orders, publications, finances and bibliography. Useful innovations are a synopsis of all the Court's judgments and opinions preceding the analyses of the cases before the Court during the year, an analytical index of all the judgments and opinions of the Court, and an important digest of the decisions taken by the Court in application of its statute and rules, followed by an analytical index of the same. A new chapter is added to the Third Report containing the first addendum to the third edition of the collection of texts governing the jurisdiction of the Court, previously published separately in Series D of the publications of the Court. The English edition of these reports follows the French custom of placing the table of contents at the end instead of at the front of the volumes, as is customary with books in the English language. This misplaced table of contents is called an "index," but there is no index, properly speaking, of the volume, although several parts are separately indexed.

British Year Book of International Law, 1927. (London: Humphrey Milford, New York: Oxford University Press, 1927. pp. vi, 256. Index. Cloth, 16 shillings net.) The eighth issue of this Year Book contains leading articles of interest in the development of international law as well as some of historical value. H. W. Malkin throws light on the inner history of the Declaration of Paris by showing from documents not heretofore available the reasons which led Great Britain to the conclusion that the acceptance of the Declaration was in the best interests of the country. Sir John Fischer Williams discusses the right of a state unilaterally to sever the ties of its nationals abroad in such a way as to get rid of its obligation to receive them back should they be expelled by the state where they happen to be residing. Mr. O. H. Mootham contributes an article on the doctrine of continuous voyage from 1756 to 1815, and Professor Brierly, of Oxford, reviews recent

proposals for an international criminal court and gives reasons why such a court would be neither a desirable nor a practical development of international organization. Dr. H. Lauterpacht has contributed an article under the heading "Spinoza and International Law." Writing before the decision of the Permanent Court of International Justice in the *Lotus* case, Mr. W. E. Beckett compares it in some respects with the decision of the fourteen English judges in the *Franconia* case before the Court of Crown Cases Reserved in 1876. Professor Higgins, of Cambridge, discusses retaliation in naval warfare as it affects neutrals, and offers some suggestions based upon the experience of the World War. Among the decisions of international tribunals printed in the volume is the text of the award in the arbitration between the Reparation Commission and the Government of the United States under which the Standard Oil Company, although holding the legal title, was denied the beneficial interest in certain tankers delivered by the German Government to the Reparation Commission. Apparently this decision has not been published in the United States. The volume also contains the usual departments devoted to decisions of national tribunals involving points of international law, reviews of books, bibliography, and summary of events.

Grotius—Annuaire international pour l'année 1927. (The Hague: Martinus Nijhoff, 1927. pp. viii, 368. Cloth, 15 guilders.) This, the thirteenth issue in the series, is a continuation of the material published in the *Annuaire* for 1926, which was noticed in this Journal, Vol. 21 (1927), page 649. The leading articles are: The Fifth Conference on Private International Law, by B. C. J. Loder; The Dutch-Belgian Convention of March 28, 1925, on "Competénce Judiciaire Territoriale, etc.," by J. R. H. van Schaik; The Hague Conference of 1925 on the Protection of Industrial Property, by J. Alingh Prins; and The Geneva Opium Conferences, by W. G. van Wettum.

XXIV^e Conférence Interparliamentaire, Paris, 1927. (Lausanne: Librairie Payot & Cie., 1927. pp. xv, 594. Index.) The twenty-fourth conference of the Interparliamentary Union, held in Paris August 25–30, 1927, was attended by delegates from thirty-three parliaments. They discussed the fight against opium and other dangerous drugs, a European customs understanding, the reduction of armaments, and the codification of international law. The reports presented to the conference, *projets* of resolutions, debates, and resolutions adopted, are included in the printed *compte-rendu* published by the Bureau of the Union.

The British Commonwealth of Nations. (World Peace Foundation Pamphlets, Vol. X, No. 6. Boston, 1927. pp. 573–693. 20 cents.) A collection of important texts showing the development of the autonomy of the British Dominions in foreign relations, from the Imperial Conference of 1917 up to

the Imperial Conference of 1926, including the interpretation of the report of the Inter-Imperial Relations Committee of the last-mentioned conference, preceded by comments on the Imperial Conference and the Balfour report, by A. Lawrence Lowell and H. Duncan Hall, respectively. The correspondence and utterances of the Ministers of the Dominions suggest several thorny problems of constitutional and international law about which much could be written.

China To-day: Political. By Stanley K. Hornbeck. (World Peace Foundation Pamphlets, Vol. X, No. 5. Boston, 1927. pp. 417–566. 5 cents.) A useful compilation of information regarding the Chinese transformation, developed under the headings: The Revolution and Nationalism, The Revolt Against External Influences, and The Attitude and Policy of the United States, with an appendix of texts containing treaties, political declarations, and state papers, ending with President Coolidge's address of April 25, 1927.

Proceedings of the Institute of International Relations. (Los Angeles: University of Southern California, 1927. pp. 181. $4.00.) To provide an opportunity for the Pacific Coast States similar to that afforded to the Eastern States at Williamstown, Mass., the Institute of International Relations was inaugurated at Riverside, California, December 5–12, 1926. In a series of round table discussions, luncheon addresses, afternoon conferences, and evening lectures, about 100 members and delegates, representing half as many educational institutions, clubs and organizations, participated either as speakers or auditors in the consideration of many subjects, some of them of world-wide concern, such as the limitation of armaments, the League of Nations, the World War, the protection of minorities, and world markets, and other subjects having a special relationship to the Pacific, such as immigration, race relations, over-population and the food supply, and the Tacna-Arica dispute.

Commission Mixte de Réclamations Germano-Américaine. By J. C. Witenberg. Vol. 2. (Paris: Les Presses Universitaires de France, 1927. pp. viii, 176.) A continuation of the excellent French translations of selected decisions of the Mixed Claims Commission, United States and Germany.

Annals of the American Academy of Political and Social Science. (Vol. CXXXII, No. 221. July, 1927.) At its thirty-first annual meeting, the Academy considered the foreign policy of the United States with reference to Russia, China, Central America, Mexico, and world peace. The thirty-seven papers prepared by specialists on these subjects are reproduced in this issue of the Annals, with President Coolidge's address of April 25, 1927, as an introduction. (Vol. CXXXIV, No. 223, November, 1927) contains a

special study of European economic conditions in 1927 made for the Academy by Prof. Ernest M. Patterson. The report of the International Economic Conference adopted at Geneva on May 23, 1927, is printed as an appendix to the survey, preceded by a number of contributions by prominent Europeans on special phases of European conditions.

Historia de los Limites del Peru. By Juan Angulo Puente Arnao. (Lima: Imprenta de la Intendencia General de Guerra, 1927. pp. iv, 312. Maps, ils.) A history of the boundaries of Peru from colonial times to the attempted plebiscite in 1925–1926 and the exchange of memoranda which followed the termination of the plebiscitary proceedings, written by a member of the law faculty of the University of San Marcos, with a prologue by Dr. Angel Gustavo Cornéjo, President of the Peruvian Juridical Commission in Tacna Arica. About one-third of the book contains a narrative of the abortive effort to hold a plebiscite in Tacna Arica, and the remainder relates to the boundary disputes with Colombia, Ecuador, Brazil and Bolivia.

Pages from Bulgaria's Life. Year Book for 1924–1927. (New York: Bulgarian Student Association, 1927. pp. 116. Map.) Contains a series of separate articles under the titles History and Law, Education and Press, Poetry, Theatre and Music, and Economics and Labor.

Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes. Edited by Dr. Franz Schlegelberger and others. (Berlin: Franz Vahlen, 1927. Vol. I, first half, pp. iv, pp. 286, Rm. 18; Vol. II, part I, pp. 80, Rm. 5.) This comparative law lexicon will consist of two main divisions; the first will give a perspective of the sources of law in each of the various countries of the world; the second will be a dictionary of words and phrases used in German law and legal literature, with definitions and exposition of the law of Germany compared with the parallel subjects in the law of foreign countries. The first half of Volume I comprises the sources of the law of European countries. The other parts of the world are to be covered in the second half. The part of Volume II already published includes only the headings from "Abandon" to "Aktiengesellschaft." Judging from the parts already published, the undertaking promises to be one of great usefulness. The principal collaborators with Professor Schlegelberger are well known and include Dr. Walter Simons, President of the German Reichsgericht, Professor Heinrich Titze and Professor Martin Wolff. The outline of sources as well as the main part, give an intelligent outline of the written law and other authorities. References are given to codes and statutes and comparisons between various legal systems are frequently made in the course of the textual comment. Each subject is followed by a useful bibliography.

BOOKS RECEIVED

Academie de Droit International. *Recueil des Cours.* 1926. (4 Vols.) Paris: Librairie Hachette, 1927.

Archivo Historico Diplomatico Mexicano, num. 24. *La Anexion de Centro America a Mexico.* Tomo II. Compilacion de Rafael Heliodoro Valle. Mexico: Publicaciones de la Secretaria de Relaciones Exteriores, 1928. pp. 469.

Balch, Emily Greene. *Occupied Haiti.* New York: The Writers Publishing Co., 1927. pp. viii, 186. Index.

Bogolepov, A. A. *Die Rechtsstellung der Ausländer in Sovet-Russland.* Berlin: Hermann Sack, 1927. pp. 194. Index.

Brachet, Paul. *De l'Exécution Internationale des Sentences Arbitrales.* Paris: Rousseau & Co., 1928. pp. iv, 233. 30 francs.

Brailsford, Henry Noel. *Olives of Endless Age.* Being a study of this distracted world and its need of unity. New York: Harper & Brothers, 1928. pp. 431. $3.50.

Bywater, Hector C. *Navies and Nations.* Boston & New York: Houghton, Mifflin Co., 1927. pp. viii, 285. Index. $4.00.

Calhoun and Delamere. *Working Bibliography of Greek Law.* (Harvard Series of Legal Bibliographies.) Cambridge: Harvard University Press, 1927. pp. xii, 144.

Cambridge Historical Journal. Vol. II, No. 2. London: Cambridge University Press, 1927. Chicago: Chicago University Press, 1927. pp. x, 197. 6s. net.

Coe, Samuel Gwynn. *The Mission of William Carmichael to Spain.* (Johns Hopkins University Studies, Series XLVI, No. 1.) Baltimore: Johns Hopkins Press, 1928. pp. viii, 116. Index. $1.00.

Cox, Isaac Joslin. *Nicaragua and the United States, 1909–1927.* (World Peace Foundation Pamphlets, Vol. X, No. 7.) Boston: World Peace Foundation, 1927. pp. 695–890. 30 cents.

Davis, Stephen. *The Law of Radio Communication.* New York: McGraw-Hill Co., 1927. pp. 206. Index. $3.00.

Dennis, Alfred L. P. *Adventures in American Diplomacy.* New York: Dutton & Co., 1928. pp. xii, 537. Index. $5.00.

De Ruggiero, Guido. *The History of European Liberalism.* Translated by R. G. Collingwood. New York: Oxford University Press, 1927. London: Humphrey Milford, 1927. pp. xii, 476. Index. $5.50.

De Vabres, H. Donnedieu. *Les Principes Modernes du Droit Pénal International.* Paris: Recueil Sirey, 1928. pp. 470. 46 fr. 50.

Dugdale, Mrs. Edgar. *The Hungaro-Rumanian Dispute.* The Optants' Case before the League. London: Association for International Understanding. pp. 48. 6d.

Elorduy, Lic. Aquiles. *Alegato Verbal, "Casos de Santa Isabel."* Mexico: Imprenta de la Secretaria de Relaciones Exteriores, 1927. pp. 80.

Freund, Heinrich. *Strafgesetzbuch Gerichtsverfassungsgesetz und Strafprozessordnung Sowjetrusslands.* (Osteuropa-Institut in Breslau.) Mannheim: J. Bensheimer, 1925. pp. xii, 479. Index.

Garner, James W. *American Foreign Policies.* New York: New York University Press, 1928. pp. vi, 264. Index.

———. *Political Science and Government.* New York: American Book Company, 1928. pp. x, 821. Index.

Grande, Ettore. *La Radiotelegrafia nel Diritto Internazionale.* Preface by Pietro Cogliolo. Milan: Ulrico Hoepli, 1927. pp. xii, 151. L. 12.50.

Haring, Clarence H. *South America Looks at the United States.* New York: Macmillan Co., 1928. pp. x, 243. $2.50.

Heller, Hermann. *Die Souveränität—Ein Beitrag zur Theorie des Staats- und Völkerrechts.* Berlin & Leipzig: Walter de Gruyter & Co., 1927. pp. 177.

Institut Français de Washington. *The Treaties of 1778 and Allied Documents.* Edited by G. Chinard, with an introduction by James Brown Scott. Baltimore: Johns Hopkins Press, 1928. pp. xxv, 70. $2.50.

Journal of the Royal Institute of International Affairs. London: Royal Institute of International Affairs, 1927–1928. Vol. VI, No. 6, November, 1927, pp. 333–404; Vol. VII, No. 1, January, 1928, pp. 76. 1s. 6d. each.

Kenworthy, J. M. *Peace or War?* New York: Boni & Liveright, 1927. pp. xxii, 338. Index. $2.50.

Lange, Chr. L. *Die Interparlamentarische Union und die Entwicklung des Völkerrechtes.* (Institut für Internationales Recht an der Universität Kiel) Kiel: Verlag des Instituts für Internationales Recht, 1927. pp. 31. M. 1.80.

Lutz, Hermann. *Lord Grey und der Weltkrieg.* Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1927. pp. xii, 421. Index.

Magnier, Léon. *La Chambre de Commerce Internationale.* Paris: Rousseau & Co., 1928. pp. vi, 139. Index. 20 francs.

Matsunami, N. (editor). *The Report of the Japanese Maritime Law Association.* No. 12 (1927).

Mattern, Johannes. *Concepts of State, Sovereignty and International Law.* Baltimore: Johns Hopkins Press, 1928. London: Humphrey Milford, 1928. pp. xx, 200. Index. $2.50.

Maurach, Reinhart. *System des Russischen Strafrechts.* (Osteuropa-Institut in Breslau.) Berlin: Hermann Sack, 1928. pp. 207.

Mears, Eliot Grinnell. *Resident Orientals on the American Pacific Coast—Their Legal and Economic Status.* Preliminary report prepared for the July 1927 Conference of the Institute of Pacific Relations in Honolulu. New York: Institute of Pacific Relations, American Group, 1927. pp. xvi, 526.

Mehrmann, Karl. *Locarno Thoiry Genf—in Wirklichkeit.* Berlin: Reimer Hobbing, 1927. pp. iv, 207.

Morison, Samuel Eliot. *The Oxford History of the United States.* (2 Vols.) New York: Oxford University Press, 1927. Index. Maps. $10.00.

Mückler, Andreas. *Das Deutschtum Kongresspolens.* (Schriften des Institutes für Statistik der Minderheitsvölker an der Universität Wien.) Vienna: Franz Deuticke, 1927. pp. iv, 88. M. 4.

Müller, Joseph. *Das Friedenswerk der Kirche in den letzten drei Jahrhunderten, 1598–1917.* Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1927. pp. viii, 483. Index. M. 25–30.

Niboyet, J. P. *Précis Élémentaire de Droit International Privé.* Paris: Recueil Sirey, 1928. pp. vi, 361. 18 francs.

Norton, Henry Kittredge. *Back of War.* New York: Doubleday, Doran & Co., 1928. pp. xviii, 356. $2.50.

Opinions of Commissioners under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico. Washington: U. S. Govt. Printing Office, 1927. pp. iv, 489. Index.

Panunzio, Constantine. *Immigration Crossroads.* New York: Macmillan Co., 1927. pp. xii, 307. Index. $2.50.

Puente, Julius I. *International Law as Applied to Foreign States.* Chicago: Burdette J. Smith & Co., 1928. pp. xxiv, 299. Index. $5.00.

Renouvin, Pierre. *The Immediate Origins of the War.* Translated by Theodore Carswell Hume, with a Preface by Charles Seymour. New Haven: Yale University Press, 1928. pp. xvi, 395. Index. $4.00.

Roa, Fernando Gonzalez. *Las Cuestiones Fundamentales de Actualidad en Mexico.* Mexico: Imprenta de la Secretaria de Relaciones Exteriores, 1927. pp. 253.

Robinson, Jacob. *Das Minoritätenproblem und seine Literatur.* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht.) Berlin & Leipzig: Walter de Gruyter & Company, 1928. pp. 265. Index. M. 9.

Romano, Santi. *Corso di Diritto Internazionale.* Padova: Casa Editrice Dott.A. Milani, 1926. pp. ii. 252. Index. L. 35.

Roosevelt, Nicholas. *The Restless Pacific.* New York & London: Charles Scribner's Sons, 1928. pp. xii, 291. Index. $3.00.

Ruelle, Ugo. *Principii di Radiotecnica.* Preface by G. Vallauri. Milan: Ulrico Hoepli, 1928. pp. viii, 364. Index. L. 35.

Spicer, George Washington. *The Constitutional Status and Government of Alaska.* (Johns Hopkins University Studies in Historical and Political Science, Series XLV, No. 4.) Baltimore: Johns Hopkins Press, 1927. pp. x, 122. $1.25.

Spiegel, Manka. *Das Völkerrechtliche Mandat und Seine Anwendung auf Palästina.* Vienna: Leuschner & Lubensky, 1928. pp. 182.

Spiropoulos, Jean. *Die allgemeinen Rechtsgrundsätze im Völkerrecht.* Kiel: Verlag des Instituts für internationales Recht an der Universität Kiel, 1928. pp. x, 71. M. 6.

Stern, Jacques. *Naturrecht und Weltrecht im Lichte der Rechtsentwicklung Japans und Chinas.* Berlin: Japaninstitut, 1927. pp. 24.

Stimson, Henry L. *American Policy in Nicaragua.* New York: Charles Scribner's Sons, 1927. pp. 129. $1.25.

Strupp, Karl. *Wörterbuch des Völkerrechts und der Diplomatie.* (Band III) 3 Volumes. Berlin: Walter de Gruyter & Co., 1926–1927.

Till Fragan om Gränsen för Sveriges Territorialvatten. (Aktstycken Utgivna av Kungl. Utrikesdepartementet.) Stockholm: P. A. Norstedt & Söner, 1928. pp. 124.

Toulemon, André. *Le Progrès des Institutions Pénales.* Paris: Recueil Sirey, 1928. pp. iv, 249. 40 francs.

Toynbee, Arnold J. *Survey of International Affairs, 1925.* Vol. I—*The Islamic World Since the Peace Settlement.* New York: Oxford University Press, 1927. London: Humphrey Milford, 1927. pp. xvi, 611. Index. Maps. $8.50.

Tyler, Alice Felt. *The Foreign Policy of James G. Blaine.* Minneapolis: University of Minnesota Press, 1927. pp. 411. Index. $3.50.

Union Interparlementaire. *Le Controle Parlementaire de la Politique Étrangère en Europe et au Canada.* (Réponses á une enquête de la Commission pour l'étude des questions juridiques, publiées par Léopold Boissier, Secrétaire adjoint de l'Union.) Geneva: Bureau Interparlementaire, 1926. pp. vii, 75.

Valery, Jules. *La Nationalité Française.* Commentaire de la loi du 10 août 1927. Paris: Librairie Générale de Droit et de Jurisprudence, 1927. pp. 88.

Van Deth, A. *Étude sur l'Interprétation du Paragraphe 8 de l'Article 15 du Pacte de la Société des Nations.* 1928. pp. 155.

Van Essen, J. L. F. *Ontwikkeling en Codificatie van de Diplomatieke Voorrechten.* The Hague: S. Gouda Quint, 1928. pp. xii, 227.

Van Zanten, H. *L'Influence de la Partie XIII du Traité de Versailles sur le développement du droit international public et sur le droit interne des États.* (L'Organisation Permanente du Travail.) Leiden: E. J. Brill, 1927. pp. 157.

Weiss, André. *Manuel de Droit International Privé.* Supplément—Loi sur la Nationalité. Paris: Recueil Sirey, 1928. pp. 67.

Woolery, William Kirk. *The Relation of Thomas Jefferson to American Foreign Policy.* (Johns Hopkins University Studies in Historical and Political Science, Series XLV, No. 24.) Baltimore: Johns Hopkins Press, 1927. pp. viii, 128. Index. $1.00.